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SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1950

## No. 318

VIOLA HALL MOORE, ADMINISTRATRIX OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED, PETITIONER,

*vs.*

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1950.

CERTIORARI GRANTED NOVEMBER 6, 1950.

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

**IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND**

CIVIL ACTION No. 1023

VIOLA HALL MOORE, Administrator of the Estate of LOUIS LEE MOORE, JR., deceased, Plaintiff,

*v.*

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Defendant

COMPLAINT—Filed July 18, 1949

1. Plaintiff has duly qualified and is now acting as administrator of the Estate of Louis Lee Moore, Jr., deceased, who died on September 25, 1948, as a result of the injuries hereinafter described.

2. Before and at the time of the injuries sustained by plaintiff's decedent resulting in his death, which is the subject of this complaint, defendant was a common carrier by railroad, owning and operating, in interstate commerce, a main line railroad from Fortress Monroe, Virginia, to Cincinnati, Ohio, said railroad being operated through the Richmond Division of the United States District Court for the Eastern District of Virginia, maintaining a divison point with offices, railroad yards, repair shops, etc., at Richmond, Virginia, within said division of said district; and the injuries complained of occurred while it was engaging in such commerce and while plaintiff's decedent was being employed by defendant in such commerce, his duties being in furtherance of interstate and foreign commerce and directly, closely and substantially affecting such commerce. This action is brought by the plaintiff for the benefit of the surviving widow and minor children, the dependants of the decedent, under and pursuant to the provisions of the Federal Employers Liability Act, United States Code Annotated Title 45, Chapter 2, Sections 51 to 60.

[fol. 3] The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

3. On or about September 25, 1949, the defendant was engaged in coupling, uncoupling and shifting cars from one track to another in its Fulton Yard, in the City of Richmond, Virginia, in order to make up cars and trains for other destination points. While defendant was thus engaged, plaintiff's decedent was performing his duties as an employee (brakeman) of the defendant, and was riding on the rear of the tender of engine No. 114, which was making a reverse movement in a westwardly direction out of ladder track No. 12, pulling approximately 17 boxcars. Defendant, through its agents, servants and employees, then and there performed the operation in which it was engaged in a careless, reckless, unlawful and negligent manner in that while it knew, or in the exercise of ordinary care should have known full well, the position of the decedent and the work in which he was engaged, it failed to keep a proper lookout for him, to give him proper signals or warnings of its intention to stop the said engine suddenly, or to warn decedent of a hitherto unprecedented and unexpected change in the manner of shifting cars, i. e., that a sudden stop was to be made at the lead track, although it knew full well that such a change would place decedent in a position of extreme danger, if he were not so warned, and failed to operate said locomotive and cars in a careful and prudent manner under the circumstances then and there existing, and to furnish decedent a reasonably safe place in which to work, and in other respects and particulars, by reason of and as a result of which violations of law and negligence on the part of the defendant and its agents, servants and employees, defendant's said locomotive was caused to suddenly apply its emergency brakes, thereby causing decedent to be thrown from a position of safety on the rear of the tender of said locomotive upon the tracks in the path of the backing locomotive and was struck, dragged, run over, crushed and [fols. 4-5] mangled, causing him severe and grievous injuries from which he did in a few minutes thereafter die.

4. Prior to his death, decedent was a strong, able-bodied man capable of earning and actually earning Three Hun-

dred ($300.00) to Three Hundred Fifty Dollars ($350.00) a month. At the time of his death, he was thirty-one (31) years of age. Decedent's dependents, who are his widow and four minor children, have suffered great pecuniary loss and damage as a result of his fatal injuries and death.

5. Wherefore, plaintiff demands judgment against the defendant in the sum of One Hundred Thousand Dollars ($100,000.00) and costs.

Trial by jury is demanded.

Geo. E. Allen, 611 Mutual Building, Richmond, Virginia,

Geo. E. Allen, Jr., 611 Mutual Building, Richmond, Virginia, Attorneys for Plaintiff.

July 18, 1949.

(Verdicts of jury omitted in printing.)

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[fol. 6] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

MOTION TO STRIKE OR TO MAKE MORE DEFINITE—Filed July 28, 1949

Now comes the defendant, The Chesapeake and Ohio Railway Company, and avers that in line 24 of paragraph 3 of the plaintiff's Complaint, it is alleged that the defendant was negligent "in other respects and particulars", without specifying in what respect and particulars, and that said allegation is so vague and ambiguous that a satisfactory reply cannot be framed thereto, and hence the defendant moves that said allegation be stricken out of the Complaint or that a more definite statement be supplied before the defendant be required to answer said allegation.

This application is based upon the provisions of Rules 8(a) and 12(e) of the Federal Rules of Civil Procedure.

The Chesapeake and Ohio Railway Company, By Meade T. Spicer, Jr., Att'y for defendant, Address; 1103 Mutual Bldg., Richmond 19, Va.

July 28, 1949.

To: George E. Allen, Attorney for plaintiff.

Take Notice: That the above motion will be presented to the Court for hearing, on Monday, the 8th day of August, 1949, at 11:00 o'clock A. M.

Meade T. Spicer, Jr.

[fol. 7] A true copy of the above Motion with notice of time of presentation for hearing was served by mailing a copy of the same to Mr. George E. Allen, attorney for the plaintiff at his office on July 28, 1949.

Meade T. Spicer, Jr.

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[fol. 8] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

ANSWER—Filed August 8, 1949

1. Defendant admits the allegations of paragraph 1 of the Complaint, except that it is without knowledge or information sufficient to form a belief as to whether the plaintiff's decedent died as a result of the injuries alleged to have been received, or from other causes.

2. Defendant admits the allegations of paragraph 2.

3. Defendant admits the allegations of the first two sentences of paragraph 3 as to the nature of the work in which the plaintiff's decedent was engaged, except that more than 17 cars were being pulled by the locomotive.

4. Defendant denies the allegations of paragraph 3 that the operation being performed by it was performed by its agents, servants and employees in a careless, reckless, unlawful or negligent manner, with respect to the position

of the decedent and its knowledge thereof, and the work in which he was engaged; defendant denies that it failed to keep a proper lookout for decedent or failed to give him proper signals or warnings; defendant denies that the locomotive was stopped suddenly while the decedent was [fol. 9] on its tender, or that any unprecedented and unexpected change was made by it in the manner of shifting the cars.

5. Defendant denies the allegations of paragraph 3 that a sudden stop was made at the lead track while the decedent was on the tender of said locomotive, or that he was placed in any position of extreme danger by any act, omission or negligence on the part of its agents, servants and employees; defendant denies that it failed to furnish the decedent a reasonably safe place to work, in view of the nature of its business and the work required to be carried on; defendant denies that it failed to operate its locomotive and cars in a careful and prudent manner under the circumstances existing, and defendant denies that it was negligent or violated the law in other respects and particulars.

6. Defendant denies that the decedent was caused to be thrown from a position of safety on the locomotive tender, upon its tracks or in the path of said locomotive, by any sudden application of its emergency brakes, or that any act, omission or negligence on the part of the defendant was the cause of decedent falling from the tender, being struck, dragged, run over, or injured, or that there was any negligence as to the place or in the manner in which the locomotive was stopped by the defendant's employees.

7. Defendant admits the allegations of paragraph 4, except that defendant avers that his age was 32 years and that his earnings averaged $300.00 per month.

8. Defendant denies that the plaintiff is entitled to recover any sum for the injuries alleged or the consequences of such injuries.

[fol. 10] For Separate and Complete Affirmative Defenses to the Allegations of the Complaint, Defendant Alleges:

9. Defendant avers that the injuries received by the decedent in falling from the locomotive tender were solely and proximatly due to his own negligence and to his own unforeseeable and independent acts.

10. Defendant avers that the decedent was an experienced brakeman, was in a safe position and had full knowledge of the engine movements being made and to be made, before and at the time of his falling from the locomotive.

11. Defendant avers that the decedent had full knowledge of the physical situation and the method of doing the work, and was in position to have signalled the engineer, if necessary to do so, for his own safety or convenience.

12. The decedent's injuries were solely due to an accident which could not have been reasonably foreseen or anticipated by the defendant or its servants, agents and employees.

Wherefore, the defendant demands a directed verdict and judgment in its favor with costs.

Meade T. Spicer, Jr., Walter Leake, Attorneys for Defendant, Address of both: 1103 Mutual Bldg., Richmond 19, Va.

Certificate of Service

Legal service of the above Answer was made on the 8th day of August, 1949, by mailing a copy of the same to Mr. George E. Allen, attorney for the plaintiff, at his office address.

Meade T. Spicer, Jr.

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[fol.11] [File endorsement omitted]

In United States District Court

[Title Omitted]

Notice to Take Depositions—Filed August 16, 1949

Please take notice that at ten o'clock A. M., on the 25th day of August, 1949, at the offices of Allen & Allen, Attorneys at Law, 611 Mutual Building, Richmond, Virginia, the plaintiff in the above entitled action will take the deposition of Edward Wiles, engineer on the locomotive which ran over plaintiff's decedent, upon oral examination, pursuant to the federal rules of civil procedure, before A.

Colton Williams, a Notary Public, or before some other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed.

You are requested to have the above employee present. You are invited to attend and examine.

— Geo. E. Allen, 611 Mutual Building, Richmond, Virginia,

Geo. E. Allen, Jr., 611 Mutual Building, Richmond, Virginia, Attorneys for Plaintiff.

August 8, 1949.

I hereby certify that the above notice was served on Walter Leake and Meade T. Spicer, Jr., attorneys for the defendant, on the ___ day of August, 1949, by mailing a copy thereof to their last known office addresses, pursuant to Rule 5(b) of the Federal Rules of Civil Procedure.

Geo. E. Allen, Jr., Attorney for Plaintiff.

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[fol. 12] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

ORDER REQUIRING MORE DEFINITE STATEMENT, ETC.—Filed October 31, 1949

This day came the parties by their respective attorneys and the defendant's motion that the charge of negligence in the words "in other respects and particulars" contained in line 24 of paragraph 3 of the Complaint be stricken out of the Complaint or a more definite statement be supplied, having been argued and considered;

It Is Ordered that on or before December 1, 1949, a more definite statement, by way of amendment, shall be supplied by the plaintiff, or the words "in other respects and particulars" shall be taken and considered as stricken from the plaintiff's Complaint.

Sterling Hutcheson, United States District Judge.

Date: Oct. 31, 1949.

[fol. 13] We ask for this: Meade T. Spicer, Jr., for the C. & O. Ry. Co.

Seen: Geo. E. Allen, Jr., of Counsel for Plt.

[fol. 14]

ALLEN, ALLEN & ALLEN
Attorneys at Law
Mutual Building
Richmond 19, Virginia

January 24, 1950

Mr. Walkley E. Johnson, Clerk
United States District Court
Post Office Building
Richmond, Virginia

Re: Viola Hall Moore, Admr., v. C & O Railway Co., Civil Action No. 1023.

Dear Mr. Johnson:

I will thank you to issue subpoenas commanding the following witnesses to appear and testify on behalf of the plaintiff in the above-styled case:

1. Oscar P. Enroughty Ph. 4-7254, 2112 Kenwood Ave. (Lakeside), (Yard master C & O Ry. Co., Fulton Yard).

2. W. R. Gibson Ph. 3-3976, 3703 Vawter St. (brakeman C & O Ry. Co., Fulton Yard).

3. A. L. Holland Ph. 82-0621, 3916 Broad Rock Road (Conductor C & O Ry. Co., Fulton Yard).

I am enclosing attendance checks payable to the above witnesses in the sum of $4.00 each, which I will thank you to turn over to the marshal, along with the subpoenas.

Very cordially yours,

Geo. E. Allen, Jr.

GEAJr:G Enc. 3 Jan 30, 1950, 10:00 o'clock.
Issued and filed Jan. 25, 1950, Walkley E. Johnson, Clerk, Marie B. Grubbs, Deputy Clerk.

[fol. 15] Civil Subpoena

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action File No. 1023

VIOLA HALL MOORE, Admr. *vs.* CHESAPEAKE AND OHIO RAILWAY CO.

To Oscar P. Enroughty, 2112 Kenwood Ave. (Lakeside) Yard Master, C&O RR Fulton Yard, W. R. Gibson, 3703 Vawter St., Richmond, Va. (Brakeman C&O RR Fulton Yard), A. L. Holland, 3916 Broad Rock Road, Richmond, Va. (Conductor C&O RR, Fulton Yard).

You Are Hereby Commanded to appear in the United States District Court for the Eastern District of Virginia at the P. O. Bldg. 10th & Main Sts. in the city of Richmond, Va. on the 30th day of January, 1950 at 10:00 o'clock A. M. to testify on behalf of the Plaintiff in the above entitled action.

Date: January 25, 1950.

Walkley E. Johnson, Clerk. By Marie B. Grubbs, Deputy Clerk.

George E. Allen, Jr.

Return on Service

Received this subpoena at Richmond, Va., on Jan. 25, 1950 and on Jan. 25, 1950 at the above addresses I served it on the within named Oscar P. Enroughty, W. R. Gibson and A. L. Holland by delivering a copy to them and tendering to them the fee for one day's attendance and the mileage allowed by law. ($4.00). Subpoena for A. L. Holland was delivered to Mrs. Holland, his wife.

R. L. Ailworth, U. S. Marshal, by Harold D. Hamner, Deputy.

Dated Jan. 25, 1950.

Service Fees

| | |
|---|---|
| Travel | $1.32 |
| Services | 1.50 |
| Total | $2.82 |

Marshal's return filed executed Jan. 26, 1950. Walkley E. Johnson, Clerk, by M. Louise Slaughter, Deputy Clerk.
Subscribed and sworn to before me, a this day of , 19 .

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

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[fol. 16] [File endorsement omitted.]

[fols. 17-18] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 1023

VIOLA HALL MOORE, Administrator of The Estate of Louis Lee Moore, Jr., Deceased,

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

**Reporter's Transcript of Testimony and Proceedings—**
Filed March 14, 1950

Before Honorable Sterling Hutcheson, United States District Judge, and a Jury, Richmond, Virginia, January 30, 1950.

APPEARANCES:

George E. Allen, Esq., George E. Allen, Jr., Esq., Counsel for the plaintiff.

Walter Leake, Esq., Meade T. Spicer, Jr., Esq., Counsel for the defendant.

[fol. 19] A Jury was selected and sworn and opening statements were made on behalf of the plaintiff and the defendant.

DR. J. C. LEFOX, called as a witness by the plaintiff and being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. What is your profession?
A. Practicing medicine.
Q. How long have you been practicing medicine?
A. Eighteen years.
Q. Were you the coroner who saw the deceased, Mr. Moore, in this case?
A. Yes.
Q. Where was he when you first saw him?
A. He was at the undertaker's establishment.
Q. At the funeral home?
A. Yes.
Q. Did you make out the death certificate in this case?
A. Yes, sir.
Q. I will show it to you to refresh your memory.
A. I have a copy.
Q. Did you examine the body?
[fol. 20] A. Yes, sir.
Q. What did you find with reference to injuries?
A. The main injury, of course, was a fracture of the spinal cord and it was assumed he had a transection of the spinal cord itself, a fracture of the vertebrae of the neck and transection of the spinal cord itself. He had amputation of the lower left arm and he had numerous rib fractures and, from examination at the time, it was also assumed he also had punctured lungs. He had numerous other small injuries.
Q. What about generalized contusion?
A. General bruising.
Q. All over his body?
A. All over his body.
Q. Did you perform any autopsy?
A. No, sir.

Q. You noted no evidence of any disease of any kind?
A. No, sir.
Q. The examination was purely to establish the cause of death.
Q. And you established what as the cause of death?
A. Probable anatomical cause of death was transection of the cervical spinal cord, fractured ribs, punctured lung and amputation of the left arm.
Q. And under the provision "Manner of death", what [fol. 21] did you find?
A. Classified as an accident.
Q. Were you at that time employed in any way by the railway company?
A. No, sir.

Mr. Allen: That is all.
Mr. Spicer: No questions.

---

Viola Hall Moore, the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. Mrs. Moore, I believe you are the widow of Louis Lee Moore, Jr.?
A. Yes, sir.
Q. Would you mind telling us about when he lost his life?
A. September 25, 1948.
Q. For whom was he working at that time?
A. The C. & O. Railroad.
Q. In what capacity did he work for the railroad?
A. He was a brakeman at the time. He had been promoted to conductor but he was braking again.
Q. How long had he been working for the railroad [fol. 22] company?
A. It was six years and something—pretty close to seven years.
Q. How old was Mr. Moore at the time he lost his life?
A. Well, he was thirty-two years old August 27th.

Q. What was his general state of health so far as you could observe?

A. He had been in real good health for the past eleven months, I think. He was sick about thirteen months before that accident and they thought it was acute indigestion and later the C. & O. doctor said it was a heart attack he had but he was in the hospital about six weeks and he came home and he was home about two weeks and he went back to work and he had been in real good health ever since.

Q. Had he had any return of that trouble, whatever it was?

A. No, sir.

Q. And it was the C. & O. doctor that treated him?

A. Yes, sir.

Q. After he went to work from that illness on, did he work regularly?

A. Yes, sir.

Q. About what size man was your husband?

A. He was about five feet four and one-half.

[fol. 23] Q. How many children did he leave?

A. Four.

Q. What are their ages?

A. One ten, one eight, one five and one three.

The Court: Have her give the names of the children.

By Mr. Allen:

Q. Give the names of the children.

A. Caroline Virginia Moore, ten; Louis Lee Moore, Jr., was eight yesterday; Fay Dorinda Moore is five and the baby is three. She will be four next month.

Q. What is her name?

A. Maxime Marie Moore.

Q. Were you and your husband living together at the time of his death?

A. Yes, sir.

Q. Had there been any separation or thought of separation as far as you know?

A. No, sir.

Q. Was he living with you and the children?

A. Yes, sir.

Q. What sort of a family man was he?

A. He was a real good provider and good father and husband.

Q. What was his attitude toward you and the children? [fol. 24] A. He thought there wasn't anything like us. Anybody can tell you that.

Q. How much money was he earning?

A. He earned from one hundred thirty some dollars and some weeks he would earn around $160.00 every half.

Q. Making approximately $300.00 a month, you would say?

A. Yes.

Q. What did he do with that money?

A. He would cash his check and bring it home and give it all to me. I handled the money and if he wanted carfare he would ask me for it.

Q. What would he say when he would ask you?

A. He would say, "Honey"——

Q. Did he stay at home except when he was at work?

A. Yes, sir.

Q. Just contain yourself. From the time he was sick and was said by the C. & O. doctor——

Mr. Spicer: I suggest we might have an adjournment.

The Court: We will recess for a few minutes.

(A short recess was taken.)

By Mr. Allen:

Q. Mrs. Moore, when your husband left home that morning to go to work, what time did he leave?

[fol. 25] A. He left that evening about a quarter after two.

Q. Where had he been all that morning?

A. Well, he had been home all morning and he went over and got his check and brought it home and gave it to me and then he went to the grocery store and came home and ate his dinner, got his lunch and went to work.

Q. When he left, what sort of spirits was he in?

A. He was in real good spirits.

Q. Did anything appear to be wrong with him at all?

A. No, sir, he was real happy.

Q. I believe you stated that he was about as tall as you are?

A. Yes.

Q. What was his weight?

A. He weighed about 140 or 145. I think it was around 140.

Q. Have you a photograph of him taken standing by you any time shortly before the accident?

A. That picture right there was taken not quite a week before he was killed. He never did see that picture. He was talking about the picture before he went to work and he said, "Honey, I certainly would like to see that picture."

The Court: What is the purpose of that photograph? [fol. 26] Mr. Allen: It is very important to show the size and height of this man, and, in addition to that, it is part of the evidence of his family. She has testified he had these four children and the ages of them and it is corroborative of her testimony. The important thing, however, is to show his size and build, that he is actually just about her height because the picture is taken with her.

Mr. Spicer: We think he has been sufficiently described. We ask that it be stricken out.

The Court: I think he has been sufficiently described, Mr. Allen. There is no denial of the ages of any of the parties.

Mr. Allen: We wish to take an exception to that ruling upon the ground that the picture is the best evidence of the man's size, build and height, and that is one of the important things in the case.

The Court: I adhere to the ruling.

By Mr. Allen:

Q. Without showing any pictures at all, I want to ask you if he ever had his picture taken except with members of his family, so far as you know?

A. No, I don't have any of them by himself.

[fol. 27] Q. Did he have pictures taken with members of the family often?

A. Yes, sir.

Q. About how many times, according to your best recollection?

A. Well, I have an awful lot of pictures at home and all of them were made with members of the family.

Mr. Allen: If Your Honor please, it is admitted in the answer that she is duly qualified so I don't see any use in encumbering the record with the certificate of qualification.

Cross Examination

By Mr. Spicer:

Q. Did I understand you to say your husband did go to the hospital about a year before his death?
A. Yes, sir.
Q. And how long was he there?
A. About six weeks.

Mr. Allen: May it please Your Honor, some depositions on oral examination were taken. I think there were some of the pictures filed with those depositions. We would like to have them.

---

[fol. 28] Ray Selden, called as a witness by the plaintiff and being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. Mr. Selden, will you state your name, please?
A. Ray Selden.
Q. What is your occupation?
A. Professional photographer.
Q. Did you take at our request any photographs of the engine and tender involved in this case?
A. Yes, sir.

Mr. Spicer: I take it Mr. Selden doesn't mean to say what engine was involved in the case. He took a picture of an engine pointed out to him?
Mr. Allen: Engines 113 and 114.

By Mr. Allen:

Q. I hand you photographs marked Exhibits 1 and 2 which were filed with certain depositions which were taken in this case and will ask you if you, at our request, took those photographs?
A. Yes, sir.

Mr. Leake: What engine is that?

Mr. Allen: 113 and the other is the track.

Mr. Leake: Same engine?

Mr. Allen: One engine and one is the track.

[fol. 29] Engine 114 is here somewhere. Here is one we want to introduce. That is 114.

By Mr. Allen:

Q. I hand you now a photograph of Engine No. 114 with the tender with some cars hooked on it in front and will ask you if you took that photograph at our request?

A. Yes, sir, I made this photograph at your request.

Mr. Allen: We offer that in evidence. I suppose these will have to be offered again here. Those that came out of the depositions.

(The photographs were filed and marked Plaintiff's Exhibits Nos. 1, 2 and 3.)

Cross Examination

By Mr. Spicer:

Q. You didn't take any pictures with anybody on the footboard of the engine, did you?

A. No, sir, I did not.

Q. And you didn't know anything about the accident yourself?

A. No, sir.

Q. You went down and took pictures at the request of Mr. Allen?

A. Yes.

Mr. Allen: May it please Your Honor and Gentlemen, [fol. 30] we believe it will probably help if we introduce one more photograph showing the track a little bit clearer.

By Mr. Allen:

Q. I hand you a photograph showing the tracks and ask you if you can point out tracks 12 and 13 on the photograph?

A. I would hesitate to identify the tracks by number, because I made the photograph but I wouldn't know the numbers of the tracks involved.

Q. You took the photograph?
A. I took that photograph.
Q. Of the tracks?
A. Of the tracks.

Mr. Allen: We offer that in evidence as one of plaintiff's exhibits.

(Filed and marked Plaintiff's Exhibit No. 4.)

By Mr. Spicer:

Q. Would you mind stating which direction the camera was facing at that time? Call east toward Newport News and west toward Richmond.

A. The camera was facing east there, as you can see from the photograph, looking toward the coal tipple.

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Mr. Allen: We wish to call Mr. Wilds, the engineer, [fol. 31] as an adverse witness. He was in charge of the engine, in full control of its operational activities.

The Court: Mr. Allen, does it necessarily follow that he would be an adverse witness? He may be called and if he proves adverse——

Mr. Allen: That was permitted in a case in 160 Fed., a case almost identical to this in every particular and in the case involving the elevator operator of Murphy's Hotel.

Mr. Spicer: We want to say he has already had full opportunity to talk to Mr. Wilds and he has his statements reduced to writing in the form of a deposition. There is no showing of adverseness.

The Court: I think he first should be shown to be adverse.

Mr. Allen: We think that the reading of the deposition itself would show that but we pass that by for the present.

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S. E. Wilds, called as a witness by the plaintiff and being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. State your name.
[fol. 32] A. Samuel Emmet Wilds.

Q. What is your occupation?
A. Engineer.
Q. For whom?
A. Chesapeake & Ohio Railroad.
Q. How long have you been an engineer for the Chesapeake and Ohio Railway?
A. I was promoted in 1929.
Q. Were you operating the engine on the 25th of September, 1948, at the time that Mr. Louis Lee Moore, Jr., lost his life?
A. I was.
Q. What number engine was it?
A. 114.
Q. Where were you operating? On the Fulton Yards, I understand?
A. Yes, sir.
Q. In what direction was the engine moving?
A. Moving in a westward direction.
Q. However, the front of the engine was facing the opposite direction?
A. Facing the east.
Q. You were then backing up?
A. Yes, sir.
Q. Were any cars hooked to that engine and, if so, on [fol. 33] which end of the engine?
A. The cars were hooked to the front of the engine.
Q. So you were backing up, pulling the cars?
A. That is right.
Q. And you were moving in a westerly direction?
A. That is right.
Q. About how fast?
A. About five miles an hour.
Q. What time of day was it?
A. Somewhere around 3:50, I think.
Q. What was the weather?
A. As I recall, it was fair.
Q. Can you tell us about where the accident happened, just generally speaking, not the exact spot?
A. It happened on a ladder track in Fulton Yard.
Q. I hand you a photograph marked Exhibit No. 2, and will ask you if that is a fair representation of the track in the general neighborhood of where the accident happened?

A. Yes, sir.

Q. Can you point out which track is the ladder track?

A. This is it going here.

Q. In other words, you have the word "ladder" written in the middle of the ladder track?

A. I don't know whether I put that word there or not, if that is what you mean, but that is a ladder track there.

[fol. 34] Q. You remember when your deposition was taken, I believe you were asked to write the word "ladder"?

A. I may have.

Q. Anyway, that straight track is what you call the ladder track?

A. Yes.

Q. The straight track on down that way. Which way were you headed in the picture—toward us or the other way?

A. You mean which way was the engine headed?

Q. In which direction were you moving?

A. Which way was I moving?

Q. Yes.

A. Back this way.

Q. You were moving back this way. Then you were coming out of which one of these tracks over there?

A. No. 12.

Q. Is that the first one or second one?

A. Second one.

Q. You were coming out of No. 12 and coming in on the ladder track. About how far were you from the switch when you stopped, when your train came to a dead stop after the accident?

A. When the train came to a dead stop?

Q. Yes. How far was your engine from the switch?

A. An engine length or car length.

[fol. 35] Q. No, I mean about what was the distance in yards or feet of your engine from the ladder track when you came to a stop after the accident?

A. Well, I don't understand that question because the engine was on the ladder track when it came to a stop.

Q. I mean the ladder track. You were on the side track No. 12, weren't you, coming out of No. 12?

A. That is right.

Q. You were coming into the ladder track, as I understand it?

A. That is right.

Q. I want to know how far your engine was from the ladder track when it came to a dead stop after the accident?

Mr. Spicer: Your Honor, he has stated it was in the ladder track.

A. I don't understand that.

By Mr. Allen:

Q. You were in the ladder track?
A. Sure, I was on the ladder track.
Q. You had gotten out of the switch then?
A. Yes, sir.
Q. How fast were you traveling?
A. Around five miles an hour.
Q. In what capacity was Mr. Moore working at that time?
[fol. 36] A. As a brakeman.
Q. In that capacity where was he supposed to stand at that time?
A. Supposed to ride on the footboard of the engine.
Q. I show you Exhibit No. 1 which I believe also was filed with your deposition when it was taken, showing Engine No. 113. Is the footboard and all like Engine No. 114?
A. Whether that is the exact size of the 114 footboard and all like that, I don't know, but it is the same class engine.
Q. The footboard on which you said he was standing—is that the one to which I am pointing my pencil?
A. That would be the one.

Mr. Spicer: You mean the corresponding one?

By Mr. Allen:

Q. The corresponding one?
A. Yes.
Q. On No. 114. Look at Plaintiff's Exhibit No. 3 and I think you will see "114" right there.
A. No doubt that is "114" but I can't make out anything there but a "1" and a "4".
Q. Look again and see if you don't see two ones and a four?

A. I can't see it.

Q. I ask you to point out to the Jury the footboard on [fol. 37] this engine where Mr. Moore was standing.

A. You can't see the footboard very plain on that engine.

Q. It isn't so plain, I agree with you, but that is it right there, isn't it?

A. Yes. There is a footboard, I believe, right there.

Q. Point that out to the Jury, if you please.

A. Gentlemen, you can't see that picture very plain but there it is right there.

Q. Where were you in the engine at the time the accident happened, at the time that Mr. Moore fell?

A. I was sitting on the engineer's seat box in the cab.

Q. Point with a pencil about where you were.

A. I can't see the seat box.

Q. Well, you can point out where it was?

A. I could show you about where the window was. There is the window.

Q. The window on the side. Is that the window?

A. That is it.

Q. And you were sitting there on the engineer's seat inside of the cab, as I understand it?

A. Yes.

Q. Do you look in the direction in which you are moving when you are moving along?

[fol. 38] A. Yes, sir.

Q. Then you were looking west, I believe?

A. That is right.

Q. Do you look where you are going along the track when you are moving?

A. Yes, sir, you look and see the condition of things.

Q. Generally does your vision go along the track where you are going in the direction in which you are moving?

A. That is right.

Q. Was Mr. Moore giving you any signal at the time of the accident?

A. No, sir.

Q. How long had it been since he had given you any signal?

A. He gave me the back up signal to start out with on the footboard.

Q. Where was Mr. Moore found immediately after you stopped the engine and cars?

A. Laying outside the rail about ten or twenty feet from this No. 12 switch stand.

Q. What condition was his body in? Was any part of his body severed—arms or anything?

A. Well, I didn't examine the body and I didn't go close to the body after the accident.

Q. With reference to the position as to the engine and [fol. 39] tender and cars, how much of the train had passed over him or passed by him, however you want to term it?

A. An engine length, a car length and a small part of the second car in front of the engine.

Q. You refer to the engine as embracing both the tender and the engine?

A. That is right.

Q. So the tender and the engine and the first car in the front of the engine and about half of the next one?

A. Not quite half of the next one.

Q. Did you notice whether either hand had been cut off?

A. I noticed his left hand had been cut off. May I correct that? A hand had been cut off. Whether his left or right, I couldn't say positively.

Q. Do you know about how long the engine and tender and the car is that had passed over him or by him?

A. Well, boxcars run different lengths. I think it is around 36 to 46 feet.

Q. Within what distance did you stop after making the application of the brakes?

A. An engine length, a car length and around half of another car.

Q. Do you know at what rate of speed you were traveling?

[fol. 40] A. My judgment——

Mr. Spicer: He has answered that question, two or three times.

The Court: I think he has said five miles on hour.

Mr. Leake: Twice.

By Mr. Allen:

Q. Do you know whether that was as quickly as you could stop under the circumstances?

A. Yes, sir.

Q. Do you happen to know within what distance ordinar-

ily you can stop, traveling at five miles an hour by emergency application of your brakes?

A. That all depends on the condition of the equipment, the condition of the rail, and what you have to stop.

Q. Do you know what sort of application of your brakes you made in this instance, whether you put your brakes in emergency?

A. They were put in emergency.

Q. Was it a sudden stop or not?

A. Emergency stop. That is a quick stop.

Q. About as quick as you could stop ordinarily?

A. Yes.

Q. Did you reverse the engine?

A. Pulled the bar ahead, yes, sir—reverse bar.

[fol. 41] Q. Did you give any notice or warning to anybody that you were going to stop?

A. No, sir.

Q. How does a brakeman in the position that Mr. Moore was in, give you signals—by hand, bell or whistle?

A. By hand.

Q. Standing on that footboard as you say that he was, what would he have to do to give you a signal so you could see it?

A. He stands so he could see the signals.

Q. I mean so you could see it. How would he give the signal with his hand?

A. He gives a call back signal with his hand.

Q. Do you know whether or not he had to reach out from behind the tender in order to give the signal for you to see it? Would he have to reach outside?

A. Standing on the edge of the footboard and they give a signal, and you can see it. They can get on the footboard next to the drawhead and you cannot see anything.

Q. What I am asking you, does he have to reach his hand out from behind the tender for you to see the signal?

A. He has got to get out in view where you can see his hand, if that is what you are trying to get at.

Q. Do you recall being asked this question when your deposition was taken on September 2, 1949, at our office:

[fol. 42] "Q. Does he give you the hand signal while he is standing behind the tender without reaching outside or does he reach outside beyond the edge of the tender to give the signal?

"A. He has to reach out where you can see it."

A. That is correct.

Q. Is that true?

A. If he stood behind the tank where you couldn't see the signal, there would be no reason to give it to you.

Q. Is it true, as you said here, that he has to reach out where you can see it?

A. That is right.

Q. So if he gave the signal standing up straight behind the tender, without reaching out, you couldn't see it? You couldn't see the signal, could you?

A. Without leaning out, do you mean?

Q. Without reaching?

A. Without his hand going out like that, you can't see the signal.

Q. You, I believe, were on the right side of the engine and he was on the right side too, on the tender on that step on the right side?

A. Yes.

Q. Do you ever drive an automobile?

A. Yes, sir.

Q. If you are driving an automobile at most any reason-[fol. 43] able rate of speed and you have a guest sitting beside you to the right and you apply your brakes in emergency and stop without giving the guest any notice or the guest not knowing you are going to stop, do you know which way the guest would go, whether the guest would go forward toward the windshield or come back?

A. He would go forward.

Mr. Spicer: I don't see that that has got any relevancy to this case.

The Court: I rather think so myself.

Mr. Allen: I want to know if he has knowledge of the laws of physics, if Your Honor please.

The Court: I think the Jury is as well qualified as the witness to say that.

By Mr. Allen:

Q. When you first saw Mr. Moore back there was he standing up straight on that footboard?

A. Yes, sir.

Q. Did you see him do anything or make any motion

or make any movement while he was still standing up straight?

A. Yes, sir.

Q. What did he do?

A. He was standing up like that and he started to slump.

Q. Straight down?

[fol. 44] A. As if his knees gave away like that, and straightened up.

Q. When he slumped he was standing straight and then when he straightened up he was still straight behind the tender?

A. Yes.

Q. On that step?

A. Yes.

Q. You were at that time moving?

A. I was.

Q. West, as you said?

A. Yes.

Q. Then what did you do?

A. I didn't do anything at that time.

Q. You didn't do anything at that time?

A. That is right.

Q. What happened after that?

A. You want me to tell about his falling off?

Q. Yes.

A. The next thing I noticed, his body was hitting the ground and he come off the footboard in somersault position. He hit on the back part of his shoulder on the ground. His feet were laying in a westwardly position and kind of an angle to the track.

Q. When he was in the somersault position was he [fol. 45] behind the tender or outside?

A. He had come a little bit to the outside, in other words, tumbling off.

Q. How much of him was outside when you saw him in the somersault?

A. I can't tell you how much of him. I saw his body when he hit the ground.

Q. Was he clear of the engine when he turned the somersault, clear of the engine and tender?

A. No, he wasn't clear.

Q. Before he completed the somersault was he clear of it?

A. I don't understand the question. Do you mean after he hit the ground was he clear of the engine, or what do you mean?

Q. Let us illustrate it this way: Let us see, if you don't mind standing right here in front of Mr. Tilghman, and let us say this table is the outside of the engine and tender and the step is a little short of the engine and tender, the end of it. Do you know how many inches?

A. No, I do not know exactly, but it is between four and six.

Q. It lacks then from four to six inches, according to your recollection, of being out even with the outside of the engine and tender. Now then, you stand where you saw [fol. 46] him when he slumped straight down and raised straight up and then turned a somersault and went on outside.

A. With my back to him?

Q. Whichever way the man was to you—Mr. Moore was to you.

A. Standing in this position. He slumped like that as if his knees had given away. He righted himself and all in a second's time he come tumbling head foremost like this off of the engine and I seen his body when he hit the ground on the back of his shoulder.

Q. When his body hit the ground how far was he from the engine and tender?

A. I don't exactly understand what you mean. The tender was moving back all the time and he fell right on the ground right at the step of the tender.

Q. How far was he then from the railroad tracks? We will put it that way.

A. Well, I can't answer that. He was laying right up beside the rail.

Q. Was he outside of the rail?

A. He was on the outside of the rail, yes.

Q. On it?

A. Not on the rail, no.

Q. On the outside of the rail?

A. Yes.

[fol. 47] Q. On the ends of the ties?

A. Well, that track is covered up. The ties are not exposed. It is very near level there.

Q. How far was he from the rail, if you can tell us, when he hit the ground?

A. I imagine his shoulder and all hit about six or eight inches from the rail.

Q. Did any part of the tender run over him, so far as you know?

A. I don't know what run over him.

Q. Didn't you state in that deposition that not any part of it ran over him?

A. No, sir, not as I recall.

Q. Why did you ask this question that day:

"Q. He was between the wheels, wasn't he?

"A. No, he was lying on the ground on the outside of the rail and about half of the car had gone by him.

"Q. Had it run over him?

"A. No.

"Q. What part of the car or train ran over him?

"A. I couldn't tell you that. I can't answer that question."

So now is it true that any part of it had run over him or is it true that you don't know whether any part of it [fol. 48] ran over him or not?

A. I can't positively state what part ran over him.

Q. I want to know if anything ran over him?

A. Something ran over him in order to cut his wrist off.

Q. Do you recall whether you applied the brakes, according to your recollection, before or after the man hit the ground?

A. I applied the brakes just as he was hitting the ground.

Q. Didn't you say in the deposition which you gave, page 21, "When I saw him starting to fall, then is when I applied the brakes in emergency?"

A. When I see him hit the ground——

Mr. Spicer: "When I saw him fall."

Mr. Allen: He says here, "When I saw him starting to fall, then is when I applied the brakes in emergency."

Mr. Spicer: He said up above, "At the time I saw him falling I applied the brakes in emergency".

Mr. Allen: Two places near the middle of the page.

By Mr. Allen:

Q. You didn't stop until the tender had passed him, the engine had passed him and one car had passed him and [fol. 49] not quite half of another car?

A. Yes.

Q. I believe you said Mr. Moore was acting in the line of his duty when he got hurt?

A. Yes.

Mr. Spicer: I think that is a legal question.

Mr. Allen: It is unimportant. You admit it in your answer.

The Court: He has testified that he was located on the tender at the place he should have been at the time.

By Mr. Allen:

Q. Mr. Wilds, was there a switch tender where this switch comes out into the ladder track there that day?

A. I don't recall.

Q. What are the duties of a switch tender?

A. Those on Fulton Yard are required to throw switches to let trains in and out of the yard and they sometimes assist in yard switching.

Q. Then you would say a switch tender is a man that looks after the throwing of switches. Would you say that?

A. Not necessarily all switches.

Q. I don't mean that. Who was your switch tender that day?

A. I don't recall.

[fol. 50] Q. Do you know where he was?

A. No, sir.

Q. Do you know Cliff Stephens?

A. Yes, sir.

Q. Was he a brakeman?

A. As well as I can recall, he is a promoted man. He brakes and runs conductor and the like of that.

Q. Was he on duty there that day?

A. I don't recall seeing him.

Q. Does he sometimes act as switch tender on the yard under circumstances like those existing in this case?

A. Sometimes he does.

Q. Was anybody around that switch, looking after that switch, immediately before the accident—the one that you were coming out of?

A. I don't recall anyone.

Q. Did you at any time, immediately before seeing Mr. Moore, as you stated you saw him, look around ahead of you and see who was around the switch or whether anybody was at the switch, or not?

A. I was looking out the window and looking west to see if the switch were properly lined and there was anything on the lead-track as a usual thing, you know.

Q. Were you going to take all of those thirty-eight cars out at one time through that switch?

[fol. 51] A. I don't know about that. I work by signals. I don't know whether they intended to put them all out and switch them or to stop and cut part of them off.

Mr. Allen: That is all.

Cross Examination

By Mr. Spicer:

Q. Mr. Wilds, the last question Mr. Allen asked you you were coming out of this No. 12 track with thirty-three cars behind the engine?

A. Yes.

Q. Pulling them?

A. Yes.

Q. Had you received any signal at that time to stop or to do anything—cut off any of the cars?

A. No, sir, I had not.

Q. What were you going to do in the event you didn't receive any further signals either from the conductor or from Mr. Moore or from anybody else?

A. Keep pulling the cars on back until I received a signal.

Q. And until you cleared the switch, until you cleared No. 12 switch?

A. Yes, sir.

Q. You keep——

[fol. 52] A. Probably beyond.

Q. You keep on going?

A. Yes.

Q. Mr. Wilds, who was Mr. Stephens referred to—a member of the crew that day?

A. I don't recall him being on that.

Q. Did you have a conductor in charge of your work?

A. Yes, sir.

Q. Who was he? Have you seen him here?

A. I can't think of it—Luther Holland.

Q. Mr. Wilds, what were you all doing at that particular time that this move of coming out of No. 12 switch took place?

A. We were coming back preparing to switch those cars.

Q. Was that what is known as a transfer job—the work you all were doing?

A. That is known as a transfer job that we were on but we were switching on the lead job.

Q. You were taking cars that had been brought in by a train and left in that track? Is that right?

A. That is right, sir.

Q. And you had coupled up to thirty-three of them. Were they loaded cars?

A. Yes, sir, they say they were loaded cars.

Q. What kind of cars—passenger cars?

[fol. 53] A. Most of them box cars.

Q. That was a freight train, wasn't it?

A. Yes.

Q. How far had you gone into No. 12 track with the engine before you coupled up to these cars?

A. I would say around ten or twelve car lengths.

Q. Was Mr. Moore on the engine at that time?

A. I don't recall where Mr. Moore rode up in that track—whereabouts on the engine he was at that time, going up in the track.

Q. Was he on the tender at the time the engine started going west, pulling thirty-three cars?

A. Yes, sir, he gave the signal to back up.

Q. He gave you the back-up signal?

A. Yes, and he was standing on the rear footboard.

Q. In the same place that he was at the time of the accident?

A. Same place.

Q. Same footboard?

A. Yes, sir.

Q. Mr. Wilds, what was Mr. Moore's job on the footboard there? What was he supposed to do?

A. His duties was to ride the rear of that footboard to the switch or beyond the switch and where ever he thought he was going to get off at, get off and cut the cars as [fol. 54] they switch them.

Q. Was there any reason for him to have gotten off of the footboard before the engine and tender reached the switch?

A. No, sir.

Q. Did you get any signal from him at all after he had given you the original back-up signal?

A. No, sir, none whatsoever.

Q. If any train had been coming or any engine had been coming on the same track down opposite the way you were coming, was it Mr. Moore's duty to give you a signal or protect the movement?

A. Oh, yes, sir, it was his duty.

Q. And he had not give you any such signal?

A. No, sir.

Q. Had anything happened at all to cause you to make any stop until Mr. Moore was seen to fall from the engine?

A. No, sir.

Q. Did you have any reason to make any stop until after you saw Mr. Moore fall?

A. No, sir.

Q. What would be the effect of the thirty-three cars that you were pulling on your stopping? Would that make it harder to stop or make it take a longer period of time and space to stop or shorter period?

[fol. 55] A. It would take a longer time to stop. You have so much weight behind you to stop.

Q. Was there any air pressure on those cars behind you?

A. No, sir, no air on the cars.

Q. Is it customary to have air taken off of cars before you start to switch them around the yard?

A. Yes. They bleed the air off the cars.

Q. It is much easier to move them around in switching?

A. Yes.

Q. Mr. Wilds, the move you were making—was there anything unusual about the coming out of No. 12 track into the ladder track?

A. No, sir, nothing that I know of.

Q. Was that in accordance with regular custom of doing the work?

A. Regular routine of duty, yes, sir.

Q. Was it anything unusual for Mr. Moore to be riding on the footboard of the engine?

A. No, sir.

Q. Is that a customary part of a brakeman's duty?

A. That is his duty, yes.

Q. Mr. Wilds, was there any rough handling of the cars or any jolt to the train immediately prior to the time that Mr. Moore slumped down or fell off?

[fol. 56] A. None that I noticed.

Q. You had been coming with the thirty-three cars steadily since the time you started?

A. That is right.

Q. And that was some ten car lengths away?

A. That is right.

Q. Were you able, in approaching No. 12 switch, to see whether the switch was properly fixed for you to come into the ladder or lead track?

A. Yes, sir, I could see that the switch was properly lined for my movement.

Q. Was Mr. Moore in position also to see that from where he was standing?

A. Yes, sir.

Q. He was facing in that direction?

A. That is right, yes, sir.

Q. If he had given you a signal, he would have given you a signal facing forward and having his back to you? Is that right?

A. That is right, yes, sir.

Q. And his back was to you continuously until the time that he fell?

A. That is right.

Q. When you saw Mr. Moore fall what did you do?

A. When I saw him fall?

[fol. 57] Q. Yes; did you continue to look at him or did you do something else?

A. No, sir. My attention was attracted to shut off the train. I shut off the throttle, throwed the brakes in emergency, cut on the sand and threw the reverse bar in.

Q. Did you do everything you could to stop?

A. I did everything I could to stop as quick as I could.

Q. Was there anything else you can see now, looking back, that you could have done?

A. Nothing that I know of.

Q. Were you expecting to stop before reaching that switch?

A. No, sir.

Q. Between the time that Mr. Moore slumped, you say, and straightened himself up right away, would there have been any time to have done anything in that period before he fell?

A. No, sir, it all happened within a couple of seconds.

Q. Mr. Wilds, you were at that time in the cab? You were in the engine cab?

A. Yes, sir, sitting on the engineer's seatbox in the cab.

Q. Which way were you facing?

A. I was facing the outside of the engine.

[fol. 58] Q. Which way were you sitting as to the cab?

A. Can I show you in this chair?

Q. Yes.

A. Say this is the arm rest of the cab. We have an arm rest. I was sitting in this position with my hand on the throttle, looking out to see the switch.

Q. Which side of the engine were you on at that time? Which is west?

A. You say which side of the engine?

Q. The engineer's side is on the righthand side?

A. Yes.

Q. That is when you are going forward? Is that right?

A. Well, you are on the right side of the engine going forward or going backward.

Q. You don't mean to say you change seats? It is still the same seatbox?

A. Yes.

Q. When you were going west you were actually on the left side of the engine?

A. Well, I don't know.

Q. The way the engine was going? You were on the south side?

A. That is right.

Q. Considering Richmond and Chicago are west, you were facing west, weren't you?

[fol. 59] A. Yes, I was looking back west.

Q. That put you on the south side of the engine?

A. That is right.

Q. Was your head altogether in the cab?

A. No, sir. I was leaning out the cab in order to look back to see my switches.

Q. To see the switch?

A. Yes.

Q. What about Mr. Moore?

A. And see any signals he might give.

Q. Was Mr. Moore continuously—or a part of Mr. Moore continuously in your view up to the time he fell?

A. The edge of his shoulder.

Q. From the edge of his shoulder?

A. Yes.

Q. And his arm?

A. Just the edge of his shoulder and arm.

Q. Did you have any difficulty in keeping him in view?

A. Sir?

Q. You didn't have any trouble keeping him in sight, did you?

A. No, sir.

Q. Mr. Wilds, I hand you herewith a picture to be marked Defendant's Exhibit A and ask you if you can identify that as the picture of Engine No. 114 taken from the side?

[fol. 60] A. Yes, sir.

Q. Is that a picture of you in the cab?

A. Yes, that is me in the cab.

Q. And I see a picture of a man on the footboard of the tender?

A. Yes, sir.

Q. Is that the footboard on which Mr. Moore was riding at the time the engine was coming out of No. 12 track?

A. Yes, sir.

Q. Was he continuously there until he fell?

A. Yes, sir.

Q. And you could see him until he did fall?

A. Yes, sir.

Q. Or part of him?

A. Yes, sir, part of his shoulder.

(Filed and marked Defendant's Exhibit A.)

Q. I hand you another picture marked Defendant's Exhibit B and will ask you if you can identify that as a

picture of Engine No. 114 taken facing the rear of the tender?

A. Yes, sir.

Q. Is the man on the footboard of that tender in that picture in about the position that Mr. Moore was at the time of the accident?

A. The same position about.

Q. Is that your head shown there in that picture leaning [fol. 61] out of the cab at that time?

A. Yes, sir.

Q. Mr. Wilds, what is that man in the picture holding onto?

A. The handrail.

Q. And that runs across the rear of the tank?

A. Yes.

Q. There isn't any footboard or step in the center of the car at the rear, is there? There isn't any footboard in the middle on this engine?

A. In between the footboards?

Q. Yes.

A. No.

Q. In other words, the coupling was in there but there is no footboard in the middle of that or underneath the coupling?

A. No, sir.

Q. Mr. Wilds, Mr. Allen asked you if you gave anybody any notice or warning that you were going to apply the emergency brake when you did apply it?

A. No, sir, I didn't give anyone.

Q. Why didn't you give anybody notice?

A. Well, it wasn't necessary in the first place, and, in the next place, I didn't have time to give anybody any notice.

[fol. 62] Q. Did you consider it much more important to put the brakes on as best you could rather than try to notify anybody?

A. Stop as quick as I could, yes, sir.

Q. Mr. Wilds, was it necessary for you to get any signal from anybody at that switch stand, No. 12 switch stand?

A. No, sir.

Q. You didn't have to get any o. k. from anybody to come out on the ladder or lead track, did you?

A. No, sir.

Q. You didn't have to get anything from a switch tender or anybody?

A. No, sir.

Q. Was Mr. Moore in position to give you any signal if that switch was not in place?

A. No, sir.

Q. How long had you all been working that day on duty before the accident happened? Had you made any moves with the engine?

A. No, that was our first move.

Q. Had you seen Mr. Moore or do you remember whether you saw him before he got on the engine?

A. When do you mean—before I started to work?

Q. Yes.

[fol. 63] A. I seen him come across to the engine.

Q. You don't remember now whether he rode the engine with you or not?

A. No, sir.

Q. Where did you get on the engine?

A. I got on the engine in what we call the ready track there by the little yard office.

Q. And you say that Mr. Moore fell, apparently striking his back, as well as you could see?

A. His back and his shoulder. He hit on his back and his shoulder.

Q. And you did not continue to look at him because you were directing your efforts to stopping the train?

A. Trying to stop, yes, sir.

Q. Do you happen to remember how long Mr. Moore had been working with that crew, that particular crew?

A. No, sir, I don't remember how many days he had been on that crew.

Q. You had seen him working as a brakeman at Fulton Yards a number of times?

A. I have worked with him a number of times, yes, sir.

Q. And you saw him, of course?

A. Yes.

Q. You certainly had no reason to do anything to hurt him in any way?

[fol. 64] A. Oh, no.

Q. And you had no idea in the world that he was going to fall off the engine at the time he did fall?

A. No, sir.

Q. So far as you noted that day, he was capable of carrying on this work?

A. So far as I know, yes, sir.

Q. Had any other member of your crew given you instructions or any signals to stop or slow up when you got to that No. 12 switch?

A. No, sir.

Q. And Mr. Moore fell off east of the switch itself?

A. Yes, sir.

Redirect Examination

By Mr. Allen:

Q. Mr. Wilds, with reference to the position in which you were seated and whether you were on the right side or left side of the engine, if you had been facing toward the front of the engine you would say you were on the right, weren't you? In other words, if you had been running in the opposite direction that you were, if you were going forward and not backward, you would have been on the right side of the engine?

A. I can explain that. The engineer's seatbox is on [fol. 68] what we term the right of the engine.

Q. And you say right with reference to going in the direction in which the front of the engine is pointing? That is right—like if you were sitting in an automobile and you are headed toward the front of the automobile, if you were headed east you would say you were on the south side, wouldn't you? Anyway, I will ask you this: Your brakes and throttle and what-not, are so made that you face the front of the engine in operating the engine? Isn't that right?

A. I don't get you exactly. We turn around on the seatbox and operate a whole lot of time and you are looking back this way out the side of the cab with your right hand working the throttle.

Q. Let us take this Bible here and let us say that is the front part of the engine—the cow-catcher is still up there. You still call them cow-catchers?

A. I don't know.

Q. Then if you were going in the direction in which the engine is pointing, the cow-catcher, you would be sitting over here facing toward the front, wouldn't you?

A. Yes, sir.

Q. But in this instance, you were backing so you had to turn, didn't you, and look out and look back.

A. This way. Here is the edge of the cab and I was [fol. 66] sitting with one arm on the armrest and hand up on the throttle and you can see anywhere you want to.

Q. So you were looking out and looking back?

A. That is right.

Q. How far is your throttle from the window that you were turned and looking back out of?

A. I don't know the exact dimensions but you can sit anywhere in that window and hold onto the throttle. In other words, the picture that was taken there of me sitting in the window, I have got my hand on the throttle, one of them, and the other one, as well as I remember—I had both hands on the armrest, taking a side view.

Q. You have reference to Defendant's Exhibit B there?

A. Yes.

Q. Is that you with your head out of the window in Defendant's Exhibit B?

A. That is me, yes.

Q. Did you have your hand on the throttle when you were looking out of the window like that?

A. Left hand on the throttle, yes, sir.

Q. Who was this man who was standing there on the footboard that day when this picture was taken?

A. His name is Nuttycomb.

Q. How tall is he?

A. I can't answer.

[fol. 67] Q. How much does he weigh?

A. I don't know that.

Q. In looking back on that day that this picture was taken, how much of that man would you see?

A. Well, you could see a little bit more of that man than you do of Mr. Moore. You could see very near that whole man's arm, shoulder and all. You can see from here right back to there.

Q. Looking at that picture, do you notice that that man is leaning somewhat outward with a part of his arm and shoulder beyond the edge of the engine?

A. According to the picture, he is.

Q. And that is the part of the man you could see?

A. I could see that man's whole arm.

Q. And you say you could see a little bit more of that man than you could of Mr. Moore?

A. That is right.

Q. As I understand, nothing was hooked to the rear of the tender?

A. No, sir.

Q. You said that Mr. Moore turned a somersault. Did he turn a somersault that way or straight or out this way?

A. He just doubled up like.

Q. In which direction was the somersault? In which direction was he turning—turning out?

[fol. 68] A. I didn't say that. He was turning backward.

Q. I want you to say. There is the tender and there is the man standing there and we will assume that the engine was moving slowly backward this way and when this man turned a somersault I want to know if he turned a somersault straight forward or turned a somersault to his right or turned any to his left?

A. He turned a somersault, just doubled up and rolled off of there a little bit on the outside.

Q. A little bit on the outside?

A. Yes.

Q. You said you saw him come to work that morning?

A. No, sir, that was in the afternoon.

Q. In the afternoon, I mean.

A. I seen him come out of the yard office that afternoon as I was going to the engine—the middle yard office.

Q. How close did you get to him before he was hurt?

A. I don't recall.

Q. Did you talk with him?

A. No, sir.

Q. Did you notice anything about him that was unusual?

A. No.

Q. So far as you could see and observe, could you say that he was all right?

[fol. 69] A. So far as I know.

Q. You, in answer to questions asked by Mr. Spicer, said that up to the time that you saw him fall you knew of nothing to cause him to fall, no unusual jolt or anything of that kind? Is that right?

A. Yes, sir.

Q. If a man were standing on the footboard, as Mr. Moore was, or anybody, for that matter; and had not

started to fall and you were to apply the brakes as you did, would that cause him to fall?

A. Not necessarily.

Q. I say would it, if he didn't have any notice of it?

A. I say not necessarily.

Recross Examination

By Mr. Spicer:

Q. Were you still in an operating position when you were looking, in a position to work the throttle at the time you were coming out of No. 12 and looking ahead and seeing Mr. Moore?

A. Yes, sir, I ride with my hand on the throttle.

Q. And you were in that position, as you say, when this picture, Exhibit B, this picture in which the man is standing on the rear of No. 114—you were in an operating position at that time?

[fol. 70] A. Yes, sir.

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Carl Torrence, called as a witness by the plaintiff and being first duly sworn, testified as follows:

Direct Examination

By Mr. Allen:

Q. Will you state your name?

A. My name is Carl Torrence.

Q. What is your occupation?

A. Consulting engineer.

Q. How long have you been practicing your profession?

A. Since 1941.

Q. What has been the nature of your work and experience during that time?

A. From 1942 through 1945 I was connected with the R. F. & P. in the Engineering Department, during which time, among my other duties, I made surveys of all accidents, made measurements of the equipment that would be involved in accidents, and determined height, clearances, and height obstructions that would obstruct the view of railroad personnel and also anyone else involved in an accident.

Q. With what states are you registered?

A. Registered in Virginia, Maryland, Delaware, Kentucky, West Virginia. That is five.

[fol. 71] Q. Where are you located now in the practice of your profession?

A. 2022 Stuart Avenue.

Q. Did you at our request make any measurement or take any observations or make any maps of this engine No. 114 upon which Mr. Moore was riding when he was hurt?

A. I made detail measurements of Engine No. 114.

Q. Have you any of the sketches or blueprints of the sketches which you made?

A. Yes, sir, that is a copy.

Q. With reference to engine and tender No. 114, did you make any measurements or take any observations and make and measurements and then make a plat showing the size and distances and what observations the engineer had there of a person riding on the footboard of the tender?

A. I did.

Q. Will you take that diagram and show exactly what you did and what measurements you made?

A. To the lefthand side of the sheet is the rear elevation of the tender, also showing part of the cab above the top of the tender. You will see that the tender width is ten feet one inch over all. The width of the cab is ten feet three inches over all.

Q. The width of the tender is what?

A. Ten feet one inch.

[fol. 72] Q. And the cab?

A. Ten feet three inches.

Q. How high is the tender? The rear part of it?

A. The tender is nine feet 7½ inches high. You will see there that the step is one foot and one-half inch above the top of the rail and from the top of the step to the top of the tender is eight feet seven inches. Then, of course, part of the tender projects above that point; the part that you see on the side elevation there projects up. The measurement is not shown but I have it if you want it. That curved part is the part of the tender that projects above the main tender and it projects up.

Mr. Spicer: I didn't hear that.

A. I was explaining that the tender has a part above the top that carries the coal. It projects up three feet

eleven inches at the side and at the center line it is four feet 5½ inches high. It is a curved shape top.

By Mr. Spicer:

Q. Did you say tinder or tender?

A. Tender.

By Mr. Allen:

Q. How high is it from the step where you have that little curved mark to the top of the water tank?

A. It is eight feet seven inches.

Q. How far is the end of that footboard on which the [fol. 73] deceased is said to have been standing to the outside of the tender?

A. The edge of the step is ten inches from the edge of the tender. The step is three foot three inches wide. You will see that dimension shown on the plan view, that is a view looking downward from the top of the tender shown on the top righthand side of the page.

Q. Can you tell us what sight obstructions there are between the engineer's seat back to the step, the footboard at the end of the tender on which this decedent is said to have been standing?

A. If you consult the side elevation here, you will see that there are two windows from which the engineer could have looked backward. There is one window called a rear window and a side window. If the engineer chose to look out the back window, you will see I have two lines there called sight lines, from the rear window. His sight would have been obstructed by the top of the tender——

By Mr. Spicer:

Q. Is that the diagram you have on the left side?

A. Yes, marked "Side elevation."

Q. Rear window?

A. Yes, that is right, the back window, and then if he had chosen to look out the side window you will see a dimension there nine inches plus or minus which is the most that [fol. 74] he could have his eye projected beyond the side of the cab—his sight line from the side window would have been obstructed at the back corner of the tender which would have been that same ten inches from the edge of the step.

By Mr. Allen:

Q. If a man had been standing there, if a man five feet 4½ inches had been standing there on the end of that step, balanced and not reaching out, what, if any, obstructions would have been in the line of vision of the engineer looking out from the cab as far as he could well look out?

Mr. Spicer: I think the question should be confined to the physical measurements. I don't think he should be putting in where a man was.

By Mr. Allen:

Q. All right, follow the physical sight lines and continue with your testimony.

A. Do you mind restating the question, please?

Q. I am asking you with reference to the sight line from the eyes of the engineer as indicated in your top plan here toward the rear of the engine and what, if anything, would obstruct the view of a man standing on the step, the footboard?

Mr. Spicer: If Your Honor please, I don't want to interrupt, but it seems to me he is asking what the engineer could see without knowing where the engineer was except [fol. 75] saying he was sitting on the seatbox.

Mr. Allen: The engineer's hand was on the throttle and he was turning around in a position like this, turned around looking out with his hand on the throttle.

The Court: I think the evidence is proper. The objection is overruled.

Mr. Spicer: We submit that the witness cannot testify as to where the engineer's head was or eye was because he didn't see the engineer there and he didn't take any measurements of the man.

The Court: I understand the question is what obstruction was there between a person sitting on the engineer's seat and a person standing on the footboard.

Mr. Allen: That is correct.

The Court: Objection overruled.

A. If the engineer's eye was projected out the side window—that is the maximum he could look out and still have his hand on the throttle——

Mr. Spicer: I object to that, his characterization of the distance he can stick out. I don't mind giving us the esti-

The Court: I think that point is well taken. There might be a variation in engineers of different sizes.

By Mr. Allen:

Q. May I ask if you sat in the engineer's seat and tested the situation yourself?

A. I did.

Q. Tell us about your sight?

A. From a point nine inches outside of the space of the cab, the sight line is obstructed at the back end of the tender and you would have no vision within that ten-inch space between the step and the edge of the tender. From the edge of the platform it would be obscured.

Q. Have you indicated on your sketch that little back window you were talking about?

A. Yes, on the back elevation. It would be marked "Rear elevation". There it shows a back window of the cab. The window to the left is dotted because it is obscured from view by the top part of the tender.

Mr. Allen: We want to offer this one in evidence just to show that little back window.

Mr. Spicer: All right.

(The photograph was filed and marked Plaintiff's Exhibit No. 5.)

[fol. 77] By Mr. Allen:

Q. I hand you a photograph which has been marked Plaintiff's Exhibit No. 5 and will ask you if you can indicate to the Jury that little rear window you are talking about on No. 114.

A. That I think is on the other side of the engine, on the opposite side that we are talking about. This is the left side of the engine, this photograph.

Q. Point out that little window.

A. You can well see the back window, this little high window, and you can also see the side window.

Q. There has been introduced in evidence by the defendant company a photograph denominated Defendant's Exhibit B and there is a man standing on the footboard which we are talking about and someone looking out of the window and it has been testified that the person looking out of

the window can see a part of the body of that man. What have you to say about that?

Mr. Spicer: We object to that.

The Court: I supposed this is based upon the inspection of the engine by the witness?

Mr. Allen: Yes.

The Court: The objection is overruled.

By Mr. Allen:

Q. Did you make an inspection of this engine and make [fol. 78] tests to determine what could be seen back there in addition to your measurements in reference to the sight lines?

A. I did, sir. The man shown here is not balanced. We assumed that a man would be balanced on his own two feet. He is holding onto the grab iron here. Of course, he could stick out much further than that if he had chosen to lean out further, supporting himself by his arm.

Mr. Spicer: I object to these characterizations as to how a man should stand and whether he is balanced or not.

The Court: I think that point is well taken. Gentlemen—the testimony as to what would be the case when a man swings out as described by the witness.

By Mr. Allen:

Q. Did you make any tests similar or otherwise to the one on Defendant's Exhibit B for the purpose of determining actually what could be seen by a person in the position of the engineer, turning and looking back with reference to a person standing on the footboard? In other words, did you place anybody on the footboard?

A. I did, sir.

Q. In what position did you place him before you made your observation—standing upright?

A. Standing upright, his foot on the edge of the step [fol. 79] which was ten inches from the edge of the tender.

Q. A man standing straight?

A. Upright, straight. I could not see him when I put my head out of the side window.

Q. Did you put your head out as far as you could see?

A. As far as I could and still have my hand on the brake.

Q. The throttle?
A. The throttle, yes, sir.

Mr. Allen: We offer one of these maps in evidence, if Your Honor please. I don't suppose there is any necessity to offer but one.

The Court: Is there any objection?

Mr. Spicer: Yes, sir, we object to it.

The Court: What is the objection?

Mr. Spicer: We object to anything except actual measurements that he made.

The Court: I understood these were taken from measurements.

Mr. Spicer: I meant actual measurements.

Mr. Allen: That is all that is on it as far as I see.

Mr. Spicer: We object to the eye position there and the eye position of the different windows because that is variable.

[fol. 80] The Court: That, of course, is variable, Gentlemen. Mr. Allen, what do you say about the eye positions? That would vary with the height of different persons occupying the position.

Mr. Allen: I ask then that this witness be permitted to stand up by the engineer and let us see about their size. The witness said he put his head out as far as he could get it and still keep his hand on the throttle. That is exactly what Mr. Wilds said he did. Apparently, I don't see much difference between the two men.

By Mr. Allen:

Q. Do you know how tall you are?
A. Five feet 10½.

Mr. Allen: May we ask how tall Mr. Wilds is?

Mr. Spicer: That wouldn't show it. The variation may not necessarily be the same, but this gentleman is not shown to have been operating the engine or to know anything about operating engines. I don't take it he has operated this engine.

Mr. Allen: It goes to the weight, certainly not to the admissibility of it.

Mr. Spicer: He can tell what he saw from a certain position but when it comes to saying an eye position for what

everybody else could see, an experienced locomotive engi-
[fol. 81] neer, I submit——

The Court: Gentlemen, I shall admit the chart, saying to the Jury, however, that these locations referred to as eye positions, as I understand from the evidence, are the positions at which this witness, Mr. Torrence had his eye at the time the measurements were taken. That does not mean that they would be the same eye positions of a person of a different build or one who didn't lean as far out or one who leans farther out of the window than Mr. Torrence did. You gentlemen will understand that.

(The chart was filed and marked Plaintiff's Exhibit No. 6.)

By Mr. Allen:

Q. What did you say your height is?
A. Five feet ten inches and a half.

The Court: I think it goes to weight rather than the admissibility.

Cross Examination

By Mr. Spicer:

Q. I take it you are not a locomotive engineer?
A. No, sir.
Q. You have not operated locomotives?
[fol. 82] A. No, sir, I haven't.
Q. And you had no occasion to attempt to operate one?
A. No, I haven't.
Q. You didn't try to operate the locomotive down there the other day, did you?
A. No.
Q. When you made the observations?
A. These are engineering measurements.
Q. They are observations made by you from a certain position taken by you. Is that correct?
A. Exact measurements of this Engine No. 114.
Q. I don't question that, from certain positions taken by you and taken by somebody else?
A. Restate that, please.
Q. I think we were in accord about that. As long as these measurements were measurements taken from the

engine, that is all. You haven't had experience to know where you would be in operating an engine?

A. I have made measurements like these before, sir, for another railroad along with my regular duty.

Q. You haven't operated the engine?

A. No, I have not operated an engine. I am a civil engineer.

[fol. 83] Redirect Examination

By Mr. Allen:

Q. Do you civil engineers have any difficulty——

Mr. Leake: I make a motion to exclude the evidence on the ground that he has not been qualified as an expert on the subject on which he has been asked to testify.

The Court: The motion is overruled.

By Mr. Allen:

Q. Do you civil engineers have any difficulty setting up sights to determine a line of vision and whether there is any obstruction in that line, and that sort of thing? I mean do you have ways to do that in the engineering profession?

A. Yes. I did it here on a paper.

Q. And you have instruments and all that you use?

A. That is right.

By Mr. Spicer:

Q. From definite positions taken?

A. Yes. May I state this, sir? From the back window the back platform is totally obstructed. From the side window you could assume one foot, two foot, three foot or four feet and if a man were tall enough and stick out another foot, he would gain about a sixteenth of an inch at the back.

[fol. 84] Q. That would have a good deal to do with where the man on the back was standing, wouldn't it?

A. If he was standing on the step.

Q. What the man in the cab would see would depend very much on how the man in the back was standing?

A. If he was standing in an upright position he would be obstructed.

Q. Is that man standing in an upright position in the picture?

A. That man is not standing. You are speaking——

Q. The one showing the man standing on the back?

A. He is not in an upright position. He is supported by lateral force.

By Mr. Allen:

Q. What did you say about each time a man would lean out of that window a foot he would see how much of an inch back there?

A. Probably between a sixteenth and an eighth of an inch more within that ten inches obstruction. The ten inches I am speaking of is the ten inches from the edge of the step to the edge of the tender.

[fol. 85] Mr. Allen: I want to call Mr. Wilds back just a minute.

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Samuel Emmett Wilds, recalled by the plaintiff, further testified as follows:

By Mr. Allen:

Q. How tall are you, Mr. Wilds?

A. Five foot, ten and three-quarters.

Mr. Allen: That is all.

Mr. Allen: May it please Your Honor, we rest with the exception of a view. I think I mentioned to these gentlemen last week that we wanted a view of this engine and tender and I believe they have it down there on the yard. I think that is a very essential part of our case.

Mr. Spicer: We would be very glad for them to have a view. The engine is in the yard. It is a little hard to get to.

The Court: What would be a good time to have the view, Gentlemen?

Mr. Spicer: We would like to give them a little notice because there are some movements back and forth.

The Court: Gentlemen of the Jury, be back here at a [fol. 86] quarter of two. Don't permit anyone to discuss it with you or in your presence. Be back at a quarter of two.

(At 12:45 a recess was taken until 1:45 p. m.)

The Court: Gentlemen of the Jury, counsel have agreed that in their opinion it will probably be helpful for you gentlemen to go down and examine the locomotive involved in this case and probably other locations. Mr. Marshal, have you arranged for transportation?

Marshal: Yes, sir.

The Court: The Marshal will take you gentlemen down there. Counsel are going.

Marshal: They are going in their own automobile and will show us the way to get there.

The Court: Gentlemen, while you are there you should not discuss this matter with any outsiders. It is not proper for you to do that. It is entirely proper for you to discuss it among yourselves and call each other's attention to anything you see which you think is of importance, but you should not permit any outsiders or anyone else except members of the Jury to talk to you about it.

Mr. Marshal, you will understand, of course, and enforce that.

Gentlemen, I understand the locomotive will not be at the point where the accident occurred, so it is merely the [fol. 87] locomotive itself which you will have an opportunity to examine—not the location of the accident.

(At 1:45 p. m. the Jury left and returned at 2:50 p. m.)

Mr. Allen: If Your Honor please, while you will take judicial notice of the American Experience Mortality Table, I believe it is customary to read the table to the Jury and we would like to read the table in this case. At 32 years of age, the expectancy is 33.92 years, according to the American Experience Table.

We rest.

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Mr. Spicer: We would like to make a motion.

The Court: The Jury will retire to your room.

(The Jury retired.)

MOTIONS FOR DIRECTED VERDICT AND TO DISMISS

Mr. Spicer: Your Honor, we desire to make a motion for a dismissal of the case on the ground that on the facts under the law the plaintiff has shown no right to relief pursuant

to Rule 41 (b) which I believe is appropriate at the end of the plaintiff's evidence where you show no right to recover upon the facts and the law, which is applicable, I believe, both to cases tried by a jury and cases tried without a jury.

We submit that the evidence here has not proven that the defendant was negligent as to any duty owed to the [fol. 88] decedent or that any such negligence was the proximate cause, in whole or in part, of his injuries and death.

The evidence is insufficient to show that the defendant was in any way responsible for the decedent falling from the moving train and being injured or that its employees did anything to cause such injuries or could have avoided such injuries being sustained.

The evidence shows that the decedent's fall, so far as the defendant was concerned, was at most an accident which could not have been reasonably foreseen or anticipated or provided against, or that it shows that it was due to his own physical condition or due to his own negligence in some way by possibly giving up his hold or not having hold, or something like that, as the sole proximate cause of the injuries and death, and that the evidence affirmatively shows that this defendant performed every alleged duty it owed to the decedent in view of the nature of the business and the work which was carried on.

The crux of the plaintiff's charge of negligence here in the complaint is that he was in a safe position on the footboard and that by reason of some unprecedented or unexpected change in the manner of shifting, a sudden stop was made without giving the deceased warning which placed him in a position of extreme danger and the stop was made and caused him to fall, a sudden application of its emergency brakes, thereby causing the deceased to be thrown from [fol. 89] a position of safety on the rear of the tender upon the track in the path of the backing locomotive. In other words, they say that he was jolted off by this application of emergency brakes by the engineer and that that is what caused the accident. We submit there is no evidence whatsoever to show that.

We think Mr. Wilds has made a perfectly logical and clear statement of what happened. He has been examined previously by the plaintiff in a deposition and there is not

the slightest evidence to indicate that there was any reason for his applying the emergency brakes or slowing up or doing anything, that Mr. Moore was the man to give him a signal if there was anything to do because Moore was on the front of the engine, the way it was going, on the front end of the tender, and that he was the man to give him any signal if anything was required to stop it but he had been able to see himself that the lead track switch was open and that there was nothing coming in the other direction.

There has been no suggestion in the evidence that anything was coming in the other direction or there was anything to be done except to carry the cars on through the lead switch and there was everything being done in the usual way, according to Mr. Wilds. It was a regular method of transferring cars, bringing them out on the ladder track [fol. 90] in order to make a proper distribution of them. Certainly there was nothing unusual to a brakeman riding on the footboard of the engine. He was an experienced man of six years' experience and was familiar with that location and Mr. Wilds certainly had nothing against him. You cannot assume that Mr. Wilds deliberately would do something to throw him off the engine, and there is no evidence that he did.

But if you disregard Mr. Wilds' testimony, there still isn't any evidence to show that the brakes were applied before he fell off. There is nothing from Mr. Torrence's statement of an affirmative nature that would show that the brakes went on before the decedent fell off the engine. There couldn't be because he wasn't there and knew nothing about it.

The sequence just isn't there. That is the sole allegation of negligence. They say he was in a position of safety, that they failed to give him a warning of intention to stop suddenly, a hitherto unprecedented and unexpected change in the manner of shifting cars, that is, a sudden stop was to be made at the lead track, although it knew full well that such change would place the decedent in extreme danger. Nobody has come forward and said that Mr. Moore was there and that this jolt from putting on emergency brakes and doing what he could do to stop it knocked him off or that it was in any way connected with his going off [fol. 91] and Mr. Wilds certainly answered every question about that, that he put on the brakes because he saw the

man fall and did the only humane thing he could have done.

We submit that there is no affirmative evidence of any negligence that is alleged in this complaint to support the plaintiff's case and that at most it is an accident which could not have been prevented. Even conceding for the purpose of argument that he got out in some way of Mr. Wilds' sight, it does not show that he did anything to stop the engine until he saw him falling.

We submit there simply isn't sufficient evidence to support a verdict for the plaintiff and we move therefore under that rule for a dismissal and we also move for a directed verdict in accordance with Rule 50 upon the same grounds.

Mr. Allen: May it please Your Honor, the question before the Court is whether there is sufficient evidence here to submit this case to the Jury. We have endeavored to find and have found several cases which we think are squarely in point on the facts and the cases hold that when the plaintiff is forced to call the engineer, as we were in this case, it doesn't make any difference what the engineer says, if his testimony conflicts with proper inferences from proven facts, then the case is one for the Jury.

[fol. 92] Let us see what you have here; you have the admission in the answer and admitted in the testimony that this man was standing on the footboard acting in performance of his duty. You have it admitted in the testimony that the decedent was not in the act of giving any signal; he hadn't given any since he gave the back-up signal to start with. You have an emergency application of the brakes and you have the man falling off right where the emergency application was made and have him killed. You have the law which says, and there is no contradiction as to that, no difference of opinion, that an emergency application of the brakes without warning is negligence and if a man is knocked off or thrown off or falls off as the result of that application, then the company is liable.

You have the questions asked by Mr. Spicer of the engineer that there was no rough rolling, nothing happened to cause this man to fall at all. So then, if the Jury believe, which they will have a right to believe, that the engineer could not see this man and that he did not tell the truth when he said the man was standing straight and he saw him slump as if his knees were giving away and then saw

him straighten up—that is what he said. According to the testimony of Mr. Torrence—and the Jurors have seen the situation too and they would have a right to pass on it from their view—but, according to the testimony of Mr. Tor-
[fol. 93] rence, the engineer could not possibly have seen that. So when he applied his brakes in order to save this man, as he says, having seen the man go through those motions, if that is not true, he applied his brakes for some other reason and he says himself that there was nothing else to cause the man to fall.

Now, to take this case away from the Jury, you have got to guess and speculate that the man might have had a heart attack or something of that sort.

Let us see the reasoning of some of the cases that are in point.

The Court: Mr. Allen, I rather think what I should do is reserve decision on this motion until after the verdict. I have recently had occasion to examine the authorities in cases of this kind and I think that I should reserve decision.

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Dr. Kinloch Nelson, called as a witness by the defendant and being first duly sworn, testified as follows:

Direct Examination

By Mr. Spicer:

Q. Doctor, will you state your name and residence and your qualifications as a physician and surgeon?

A. Kinloch Nelson, 608 West Franklin Street, Richmond,
[fol. 94] Virginia; graduated at the University of Virginia in 1927, passed the State Board the same year, and have been practicing in Richmond since 1929.

Q. Did you serve in the Medical Division of the Army in the late war?

A. I was in the 45th General Hospital from May '42 to discharge in '44.

Q. You are now engaged in practice in the City of Richmond?

A. Yes.

Q. Doctor, did you have occasion to examine Mr. Louis L. Moore, Jr., the decedent in this case?

A. I saw Mr. Moore on October 3, 1947, and daily thereafter until November 7, 1947. I can't recall whether I saw him a time or two after that in the office. During those dates he was in the hospital, between October 3rd and November 7th.

Q. Can you state what history was given by the patient?

Mr. Allen: Unless the history was given to this witness and this witness took the history, I shall object. In other words, I don't think this witness can give what the hospital records show unless he took the history himself.

By Mr. Spicer:

Q. Did you receive the history?

[fol. 95] A. I talked to Mr. Moore many times. The history that I obtained from him, so far as I recall, is substantially what is here in the record. I didn't make this actual record myself.

Q. Substantially, what was the history given by him in his conversations with you?

A. He was taken with this severe pain at 11:30 p. m., on the night—I think the day he came in, October 3rd—and this pain was very severe, in the lower chest, and moved into his neck and into the abdomen. Associated with this he had some feeling of numbness in his left arm and a few minutes later he fainted and had a large loose bowl movement. The City ambulance physician administered some medicine without any relief, gave further medicine without any particular relief, and brought him into the hospital.

Q. The dates you have given were in 1947?

A. Yes.

Q. What did you diagnose his trouble to be from?

A. He had suffered a clotting of the blood in one of the major arteries of the heart with subsequent loss of function of that portion of his heart so that it would take sometime for that area of the heart to heal and blood supply to be reestablished there.

Q. Was he kept in the hospital for that purpose?

A. Yes. We kept him in the hospital for a little over [fol. 96] a month.

Q. All in connection with this condition?

A. Yes.

Q. Was there any notation on the chart as to when he left what his condition was?

A. He left the hospital in good condition.

Q. Doctor, speaking as a physician, will you state it to be your impression or not whether a man who has had such an attack would be likely to have a recurrence of such attacks than someone who had never had that attack?

Mr. Allen: I don't think this gentleman has qualified as a heart specialist. If he hasn't, then I don't think he is competent to answer that question.

The Court: Ask him some more questions along that line.

By Mr. Spicer:

Q. Have you had any experience in the treatment of heart troubles?

A. I see a good many heart cases, yes.

Q. You treated this man at the Medical College?

A. Yes, sir.

Q. And how long has your experience in treating heart cases extended?

A. I have been treating heart cases and other cases too— [fol. 97] I haven't limited myself to heart cases—for years.

Mr. Spicer: I submit he is competent.

By Mr. Spicer:

Q. Will you state whether or not in your opinion as a physician a person who has had a severe attack such as this would be more likely to have an attack again than a person that never had such an attack?

A. I don't know the exact figures on that. They are well known, I am sure, but I believe that the liability is much greater in a person who has had a heart attack of this type to have another one than if they had never had one before. That is a matter of opinion.

Q. Speaking as a physician, if you had such an attack as this yourself, would you take any precautions thereafter?

A. I believe if I had such an attack I would be inclined to take it easy, whatever that may mean.

Cross Examination

By Mr. Allen:

Q. Doctor, referring to the history of this man which you took, did you also take his past history in reference to severe illnesses, operations or accidents?

A. Yes, sir.

Q. Did you find that he had not had any severe illnesses, operations or accidents?

[fol. 98] A. Yes, sir.

Q. And you discharged him on November 7, 1947, and he left the hospital in good condition?

A. Yes, sir.

Q. And you have not seen him from that day to this, have you?

A. I couldn't be positive. I have a vague recollection that he was in the office once or twice thereafter but I certainly didn't see him, I would say, after the first of the year, 1948, I don't believe.

Q. Didn't you write Mr. Meade Spicer here of counsel for the defendant, as follows: "Subsequently study of his case showed him to have had a coronary occlusion of the anterior type and he was kept under treatment in the hospital until November 7, 1947, on which day he left here in good condition. I did not see Mr. Moore after this."

A. That is right.

Q. If you wrote Mr. Spicer that upon his inquiry, you would probably think that is correct?

A. I cannot remember whether I saw Mr. Moore after he left the hospital, or not. I think I did see him once or twice in the office but I don't recall the circumstances of it nor do I have any record of it.

Q. Do you know whether or not he ever had any return of heart trouble?

[fol. 99] A. No, sir, I don't. My recollection of it, the last time I saw Mr. Moore, whether it was in the office or in the hospital, he was getting along very well.

Q. Do you know whether or not he worked regularly without any complaint of any kind?

A. No, sir, I do not.

Q. Did you visit him in his home or were you called to see him any more after that?

A. As far as I can recollect it, I did not see Mr. Moore after he left the hospital but it is possible that I saw him in the office once or twice in the ensuing month or so.

Q. Were you at that time in the employ of the C. & O. Railway Company?

A. No, sir.

Q. Are you now?

A. No, sir. At that time I was an employee of the C. & O. Hospital Association which is an employees' association.

Q. Did you ascertain the age of this young man?

A. Yes, sir.

Q. Did you find him otherwise generally in good condition?

A. Yes, sir.

Q. I believe his age was about 30 at that time?

A. Thirty-one.

[fol. 100] Q. Did you know whether this man went back to work or not?

A. Mr. Allen, I just don't remember. I have a vague recollection, and no record of it, that he was in the office a time or two after he left the hospital and I remember that the last time I saw him, where ever that was, he was getting along very well. What we discussed concerning what he should do and all, I cannot recall and there is no record of it in here nor do I have any at the office.

Q. You don't recall advising him not to go back to work?

A. No, sir, I can't recall advising him anything.

Mr. Spicer: We rest, Your Honor.

The Court: Any rebuttal, Mr. Allen?

Mr. Allen: No, sir, we have no rebuttal.

The Court: Gentlemen of the Jury, I will excuse you until tomorrow morning at ten o'clock. In the meantime you should not discuss this case with anybody nor permit anyone to discuss it with you or in your presence. Be back at ten o'clock tomorrow.

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RENEWAL OF MOTIONS FOR DIRECTED VERDICT AND TO DISMISS

Mr. Spicer: We renew our motion for a directed verdict for the defendant and for dismssal upon the grounds heretofore stated.

[fol. 101] The Court: I shall reserve decision upon those motions until after the verdict.

(At 4:15 p. m., the further hearing of this case was adjourned until ten a. m., January 31, 1950.)

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[fol. 102] Richmond, Virginia,
January 31, 1950.

Met pursuant to adjournment.
Appearances: As heretofore noted.

In Chambers:

Mr. Spicer: Further in support of our motion for directed verdict for the defendant, we submit that there is no evidence whatsoever to show that the brake was applied to the engine in this case prior to the decedent falling from the engine, or no evidence in the case to reasonably support any such inference.

In Open Court:

(Thereupon arguments were made on behalf of the plaintiff and defendant to the Jury.)

[fol. 103] Charge to the Jury

At this point in the proceedings as has been our custom, it is the responsibility of The Court to charge you or advise you with respect to the principles of law that should guide you in your deliberations in arriving at a verdict.

As you very doubtless know, the first thing you do when you retire to your room is to select one of your number as Foreman. The Foreman votes as any other member of the Jury. His principal function as Foreman is to preside over deliberations of the Jury, to see to it that each Juror has an opportunity to voice and express his views in an orderly manner and it is also your duty to sign as Foreman such verdict as you may return.

As in all cases, in this case you are the sole judges of the facts and nothing which I have said during the progress of the trial or nothing which I may say is to be considered by you as indicating an opinion on my part with respect to the facts. In considering the facts you are also the sole judges of the evidence and the weight to be given to the evidence. You should give to the testimony of the wit-

nesses such weight as you as men of judgment would give to affairs in your ordinary business life. You are the judges of the credibility of the witnesses and the importance or the pertinency of any testimony. You have had an opportunity through the trial to observe the witnesses [fol. 104] and in giving weight to their testimony or considering it you should take into consideration their appearance or demeanor on the stand, any interest or bias or lack of interest or bias, opportunity to observe the things to which they testified and any other matters of that kind which you would consider in your every day transactions.

As you have been told, this is an action for damages brought by the plaintiff Viola Hall Moore Administratrix of the estate of her husband against the Chesapeake and Ohio Railway Company. The action is brought under the provisions of what is known as the Federal Employees Liability Act which is an Act of Congress. That Act makes the railroad company liable in damages to an employee suffering injury because of his employment as a result in whole or in part, of the negligence of any of the employees of the railroad company. If an employee loses his life in the course of his employment as a result, in whole or in part, of the negligence of any of the employees of the railroad company, that Act makes the company liable in damages to the personal representative of the deceased employee, the administratrix in this case, for the provision for those persons dependent on him. Neither assumption of risk by employee nor his contributory negligence constitutes a bar to the action, although I shall discuss later the [fol. 105] effect of contributory negligence.

While that does not make the defendant railroad company an insurer of the safety of its employees, it does make the company liable if the injury or death as the case may be, resulted in whole or in part from negligence of the company or any of its employees.

In order for the plaintiff to recover under this Act, it is incumbent upon him to prove, or upon her to prove in this case, by a preponderance or the greater weight of the evidence that the defendant or one or more of its employees was negligent in some manner as alleged in the complaint, and that such negligence was the proximate cause, in whole or in part, of the injuries sustained by the decedent, which

resulted in his death. Unless that is proven, Gentlemen, your verdict should be for the defendant.

The issue of negligence is one for you to determine according to your finding of whether the employer's conduct, that is the railroad's conduct, the acts of its employees, measures up to what a reasonable and prudent person would have done under the circumstances then existing. You shall hold the company liable if conditions under its control are not such as a reasonable man ought to maintain in the circumstances. Bear in mind that standards maintained must be commensurate with work required to be done.

Negligence, as that term is used in this Act, is defined [fol. 106] as the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances in the case or the doing of what any reasonable or prudent person would not have done under such circumstances. Before an act of negligence may constitute the proximate cause of injury or death, it must be shown that the injury was the natural or probable consequence of such negligence or that a reasonable or prudent man could foresee that the injury might naturally result from such negligence.

Negligence cannot be presumed or inferred from mere occurrence of the injury in question. The burden is upon the plaintiff affirmatively to prove by a greater weight or preponderance of the evidence that the defendant or its agents or employees were in fact negligent and that such negligence was in whole or in part the proximate cause of the injury to plaintiff's decedent which resulted in his death.

If the plaintiff has failed to prove these facts by a preponderance or the greater weight of the evidence, then the railroad company is not liable in the case.

If you should decide that the company or any of its employees was negligent and that such negligence was the proximate cause of the plaintiff's injury, you will then have to consider whether plaintiff was also negligent, that is, whether he was guilty of contributory negligence or negli- [fol. 107] gence contributing to his injury.

While the burden is upon the plaintiff to prove by a preponderance of the evidence that defendant company was negligent, or one of the employees of defendant company

was negligent, and that such negligence was the proximate cause of the injury or death, the burden is upon defendant company to prove the plaintiff was negligent unless such negligence is shown by plaintiff's own evidence or may reasonably be inferred from all the facts and circumstances in the case.

Unlike many cases involving claims based upon charges of negligence, under the Federal Employers Liability Act if both the railroad company and the decedent, Mr. Moore, were negligent, and the negligence of the two combined to bring about the injuries resultng in Mr. Moore's death, the plaintiff is nevertheless entitled to recover, but in that event you are required to diminish her damages in proportion to the amount of negligence attributable to Mr. Moore.

In considering whether Mr. Moore was also negligent, you are to use the standard of how a reasonable and prudent workman would act under the same or similar circumstances, in other words, whether he acted as a reasonable and prudent man would have acted under the circumstances. If you find he was negligent and his negligence was the sole cause, then the plaintiff is not entitled to [fol. 108] recover anything against the defendant in the case, or should you be of the opinion that his injuries and death were solely due to an accident which could not have been foreseen or anticipated by the defendant, or should you believe that his fall from the locomotive tender was due to either his physical condition or his own negligence, and that either or both of these were the sole proximate cause of his injuries and death, then your verdict should be for the defendant. That is to say, in other words, if you believe from the evidence it is just as probable that the injury to the plaintiff or to Mr. Moore resulting in his death may have resulted from any number of several causes, for some of which the railroad company was responsible and for some of which it was not responsible, you may not speculate or guess between these causes or find that the negligence of the defendant company was in whole or in part the real cause but under such circumstances you are told the plaintiff has failed to establish her case and the defendant is not liable.

Under this Act to which I referred, that is the Federal Employers Liability Act, the company is responsible for

the negligent acts, if any, of its workmen. That is to say, if other employees of the company were careless and did not act as a reasonable and prudent workman or workmen would have, then the company would be legally responsible [fol. 109] for such carelessness on the part of such employee or employees, if it was the proximate cause of the injury or death. Gentlemen, that is true due to the fact that a corporation can act only through its employees, officers and agents.

If you believe from the evidence that plaintiff's decedent, Mr. Moore, was at the post of duty standing on the footboard of the tender from which he fell and that he had not commenced to fall until the engineer applied the brakes and shut the throttle off and brought the engine to a sudden and unusual stop, and that such action was without notice to Mr. Moore, then it was a negligent action which caused Mr. Moore to fall down and you should find for the plaintiff.

On the other hand, if you find, as I said a moment ago that Mr. Moore fell either through fault of his own or due to his physical condition or for any other reason not attributable to negligence on the part of the railroad company, then your verdict, of course, should be for the defendant.

In this connection you are told that the defendant company was not the insurer of the safety of the plaintiff decedent and was only required to exercise ordinary care to provide the decedent Mr. Moore with a reasonably safe place in which to work and to operate his engine and cars with reasonable regard for the safety of this employee and if you believe from the evidence such care as required [fol. 110] was exercised by the company, then your verdict should be in favor of the defendant.

The duty of reasonable care which the defendant owed to the plaintiff's decedent owed for his own safety and any failure on his part to exercise such care under the circumstances would be negligence on his part.

In considering your verdict you must not allow sympathy which you may feel for any person or persons to influence your verdict. A verdict either on the question of liability of the defendant or on the amount of damages should not rest upon surmise, sympathy or conjecture, but must be based upon the evidence before the Jury and the law as explained to you in the charge of the Court.

In the event you find the verdict for the plaintiff, the

damages recoverable would be such pecuniary benefit which the wife and children of the deceased reasonably might have received had he not died from his injuries. In determining pecuniary loss to children, the damages may include loss of care, counsel and education which they might have reasonably received from the father and which can only be supplied by services of another for compensation, to such other person.

Now, Gentlemen, I have discussed in considerable detail the principles of law which are to guide you. The issue [fol. 111] which you have before you is very narrow. It boils down to this: If you believe from the evidence that Mr. Moore was thrown from the tender as a result of the sudden stop or violent jerk which resulted from the unexpected application of brakes, then you may conclude that the defendant railroad company is liable for negligence. On the other hand, that is the only charge of negligence contained in the complaint. Unless you believe that, your verdict should be for the defendant.

Gentlemen, are there any other matters or facts which I have omitted?

Mr. Allen, Sr.: I don't believe, Your Honor, that you mentioned the apportionment of the verdict.

The Court: If you should find for the plaintiff, you should apportion such amount as may be awarded between the widow and the four children.

Gentlemen of the Jury, I suggest you now retire to your room. If you desire any of the exhibits you may either take them with you at this time or the Marshal will bring them to you.

(The Jury retired.)

The Court: Gentlemen, I suggest you state for the record any objections to the charge.

Of course, it is understood that the objections stated by counsel in Chambers are considered now as of this time [112] in accordance with the rules or at least considered as made in accordance with the rule at whatever time they are made.

If there is nothing further the Court will recess until the Jury returns.

(Note: The Jury returned a verdict in the following words:)

"We, the Jury, find for the plaintiff in the amounts as follows:

"$10,000.00 (Ten thousand dollars) to the widow, Viola Hall Moore;

"$6,000.00 (Six thousand dollars) to each of the four minor children;

"A total of $34,000.00 (Thirty-four thousand dollars).

"Signed, William R. Vaughan, Foreman, Dated January 31, 1950."

The Court: Are there any comments with respect to the form of the verdict? Any motions?

Mr. Allen, Sr.: Would it be better to let the verdict read, "We, the Jury of the issue joined, find for the plaintiff in the amount of $34,000.00 (Thirty-four thousand dollars), $10,000.00 to the widow, and $6,000.00 (Six thousand dollars) to each of the children."

[fol. 113] Mr. Spicer: We request a poll of the Jury.

(Each juror's name was called and asked if that was his verdict and each juror answered in the affirmative.)

The Court: Perhaps it would be better for the verdict to read: "We, the Jury upon the issue joined, find for the plaintiff and assess her damages in the amount of $34,000.00 (Thirty-four thousand dollars) to be apportioned as follows:"

Mr. Allen, Sr.: I believe you should name the children.

The Clerk (Reading verdict): "We, the Jury upon the issue joined, find for the plaintiff and assess her damages in the amount of $34,000.00, to be apportioned as follows:

"$10,000.00 to the widow Viola Hall Moore; and $6,000.00 to each of the four children, Carolyn Virginia Moore, Louis Lee Moore, III, Faye Lorinda Moore, Maxine Marie Moore."

The Jury was thereupon excused from further consideration of the case.

# MICRO

## *TRADE*

# 52

CARD MARK ®

219

MOTIONS TO SET ASIDE VERDICT AND FOR NEW TRIAL

Mr. Spicer: Your Honor please, we desire to renew the motions we have made at the conclusion of the plaintiff's evidence and at the conclusion of all the evidence and to move to have the Court set aside the verdict and any judgment entered thereon set aside and have judgment entered [fols. 114-125] in accordance with the previous motions.

I desire also to move for a new trial and that the verdict is contrary to the law and evidence and without evidence to support it and damages awarded are excessive. We will set forth that motion in a written motion within the ten-day period.

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[Reporter's certificates to foregoing transcript omitted in printing.]

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[fol. 126] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

MOTION OF DEFENDANT THAT THIS ACTION BE DISMISSED AND THAT THE VERDICT OF THE JURY AND ANY JUDGMENT ENTERED THEREON BE SET ASIDE AND THAT JUDGMENT BE ENTERED IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT, AND IF SAID MOTIONS BE NOT GRANTED, THE MOTION OF DEFENDANT FOR A NEW TRIAL—Filed Feb. 2, 1950.

The Defendant moves for a dismissal of this action on the ground that upon the facts and law the Plaintiff has shown no right to relief, and also moves that the verdict returned by the jury and any judgment entered thereon both be set aside and that judgment be entered in favor of the Defendant, in accordance with its motion for a directed verdict made at the conclusion of the Plaintiff's evidence and renewed at the conclusion of all *of all* of the evidence, and assigns as grounds of its said motions, the following:

1. Evidence insufficient to show that defendant was negligent as to any duty alleged to be owed to the decedent,

or that any such negligence was a proximate cause in whole or in part, of his injuries and death.

[fol. 127] 2. Evidence insufficient to show that Defendant was responsible for decedent's falling from the moving engine and being injured, or that its employees could have done anything to have averted the injuries sustained by him.

3. Evidence shows that decedent's fall from the engine was due either to his physical condition or to his own negligence, and that either or both of these were the sole proximate cause of his injuries and death.

4. Evidence shows at most that decedent's injuries and death were due to an accident which could not have been reasonably foreseen, anticipated or prevented by Defendant.

5. Evidence affirmatively shows that the Defendant fully performed every alleged duty owed by it to decedent, in view of the nature of its business and the dangers necessarily incident thereto, and further shows that the work was being done in the usual and customary way.

6. Evidence shows without contradiction that decedent's fall from the engine preceded the application of the brake by the engineer, and that there was no unexpected change in the manner of switching prior to decedent's fall from the engine, as alleged in the Complaint.

In the event that the foregoing motions should be overruled, the Defendant moves that said verdict be set aside and that a new trial be awarded, and assigns as grounds of its motion, the following:

1. Verdict is contrary to the law and the evidence and without evidence to support it.

2. The Court erred in overruling Defendant's objections to evidence of witness Carl Torrence, and in overruling [fol. 128] the motion of the Defendant to exclude the said testimony.

3. Damages awarded by the jury are excessive in amount.

Meade T. Spicer, Jr., Walter Leake, Attorneys for the Defendant, Address: Room 1103, Mutual Bldg., Richmond 19, Va.

CERTIFICATE

I hereby certify that a copy of the above Motion was served on George E. Allen and George E. Allen, Jr., attorneys for the Plaintiff, on the 2nd day of February, 1950, by delivering a copy thereof to George E. Allen, attorney for the plaintiff, in person.

Meade T. Spicer, Jr., Attorneys for Defendant.

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[fol. 129] UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond 6, Virginia

February 20, 1950

George E. Allen, Esquire
Mutual Building
Richmond, Virginia
Leake and Spicer, Esquires
Mutual Building
Richmond, Virginia

Gentlemen:

Re: Viola Hall Moore, Admrx. of Estate of Louis Lee Moore, Jr., Deceased—Richmond Civil Action #1023.

Receipt is acknowledged of Mr. Allen's letter of February 11, 1950, citing additional authorities to be considered in connection with defendant's motion for a directed verdict in the above case.

Upon further consideration of the motion it is my opinion that it should be granted since I do not find any evidence of negligence on the part of the defendant.

The case of *Zumwalt* v. *Gardner*, 160 Fed. (2d), 298, relied upon by the plaintiff, appears to be clearly distinguishable from this case. There the plaintiff testified that the engine was stopped suddenly, jarring him from the footboard. This was denied by the engineer. In this case the only evidence concerning the sudden stop was to the effect that the decedent fell from the train before it was brought to a stop and that the sudden stop was made because the engineer saw the plaintiff fall while the train

was moving. To sustain a verdict in this case it would be necessary to believe that the sudden stop was made before the plaintiff's decedent fell and there is no evidence of any kind to support this contention.

[fol. 130] It is argued in behalf of the plaintiff that the engineer could not have seen the decedent before he fell. If this is correct it does not weaken the defendant's case. There was no evidence of any obstruction or other reason for the engineer to apply the brakes until he saw the decedent fall and certainly there is no evidence whatever that the engine was brought to a stop before this occurred.

I have examined the cases of *Tiller* v. *Atlantic Coast Line Railway*, 318 U. S., 54; *Lavender* v. *Kurn*, 327 U. S., 645; *Tennant* v. *Peoria*, 321 U. S., 29, and other cases decided under this act. They present fine points of distinction but from language used it would seem that the proper rule might be stated substantially as: When conduct of the defendant is shown from which it is reasonably possible to infer negligence and casual relationship between such negligence and the injury, the case should be submitted to the jury who are the sole judges of the issue of fact. However, as I understand the cases, there must be shown some act or conduct from which it is reasonably possible to infer negligence.

Applying this test to the facts of the instant case, it is my opinion that there is no evidence upon which the question of negligence should have been submitted to the jury.

It is suggested that counsel for the defendant prepare and submit to counsel for the plaintiff draft of an order sustaining the motion for a directed verdict.

Very truly yours,

Sterling Hutcheson, United States District Judge.

[fol. 131] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

CIVIL ACTION #1023

VIOLA HALL MOORE, Adm'r. of the Estate of LOUIS LEE MOORE, deceased, Plaintiff

*v.*

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Defendant

FINAL JUDGMENT—Filed February 27, 1950

This cause came on for trial before the Court and a jury on the 30th and 31st days of January, 1950, both parties appearing by counsel, and the defendant having moved for a directed verdict in its favor at the close of all of the evidence, on the ground, among others, that there was no evidence to support the plaintiff's allegation of negligence on the part of the defendant, and the Court, acting pursuant to Rule 50 of the Federal Rules of Civil Procedure, having reserved decision on the aforesaid motion for a directed verdict and submitted the action to the jury, subject to a later determination of the legal questions raised by the aforesaid motion for a directed verdict, and the jury on the 31st day of January, 1950, having returned a verdict for the plaintiff in the amount of $34,000.00, and the defendant within 10 days after reception of the verdict of the jury in favor of the plaintiff, having moved to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with its aforesaid motion for a directed verdict, which said motion of the defendant and the grounds thereof were stated in writing and filed in open Court, in the presence of counsel for both parties, on February 2, 1950; and the Court, after [fols. 132-133] due consideration, now being of opinion for reasons stated in writing, in a letter addressed to counsel for the respective parties, dated February 20, 1950 and filed with the record, that there is no evidence to support the plaintiff's allegation of negligence on the part of the defendant, and that the judgment should therefore be

entered as if the requested verdict for the defendant had been directed, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said verdict for the plaintiff be and the same hereby is set aside and annulled; that the plaintiff take nothing in this case, that the action be and it hereby is dismissed on the merits, that the defendant have and recover from plaintiff its costs by it about its defense in this behalf expended, and that the defendant have execution therefor.

Sterling Hutcheson, United States District Judge.

February 27, 1950.

I ask for this.
Meade T. Spicer, Jr.

Seen and objected to on grounds heretofore assigned.
Geo. E. Allen.

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[fol. 134] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

NOTICE OF APPEAL—Filed March 14, 1950

Notice is hereby given that Viola Hall Moore, Adm'r. of the Estate of Louis Lee Moore, deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action on the 27th day of February, 1950.

Geo. E Allen, Sr., Geo. E. Allen, Jr., Attorneys for the appellant, Viola Hall Moore, Adm'r., etc., 611 Mutual Building, Richmond, Virginia.

A copy of this Notice of Appeal mailed Meade T. Spicer, Jr., Esq., Attorney, this 14th day of March, 1950.

Glover N. Buck, Deputy Clerk.

[fol. 135] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

DESIGNATION OF RECORD—Filed March 21, 1950

Appellant designates the complete record and all the proceedings and evidence to be contained in the record on appeal in this action. One copy of the reporter's transcript of evidence and court proceedings, in addition to the original heretofore filed with the clerk, is filed herewith. Dated, March 21, 1950.

Geo. E. Allen, 611 Mutual Building, Richmond, Virginia.

Geo. E. Allen, Jr., 611 Mutual Building, Richmond, Virginia, Attorneys for Appellant.

I hereby certify that a copy of the above designation was served on Walter Leake, Esquire, and Meade T. Spicer, Jr., Esquire, 1103 Mutual Building, Richmond, Virginia, attorneys of record for Appellees, by leaving same with the clerk in their office, in accordance with the provisions of Rule 5 (b) of the Federal Rules of Civil Procedure, this 21st day of March, 1950.

Geo. E. Allen, Geo. E. Allen, Jr., Attorneys for Appellant.

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[fol. 136] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

STIPULATION AS TO RECORD—Filed March 24, 1950

It is hereby stipulated between counsel for the respective parties that the record on appeal in this action shall include the following:

Praecipe filed in behalf of the plaintiff on January 24, 1950 for the attendance of the witnesses Oscar P. En-

roughty, W. R. Gibson and A. L. Holland and subpoenas issued and returned thereon.

Walter Leake, Meade T. Spicer, Jr., Attorneys for the Defendant.

Geo. E. Allen, Attorney for the Plaintiff.

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[fol. 137] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

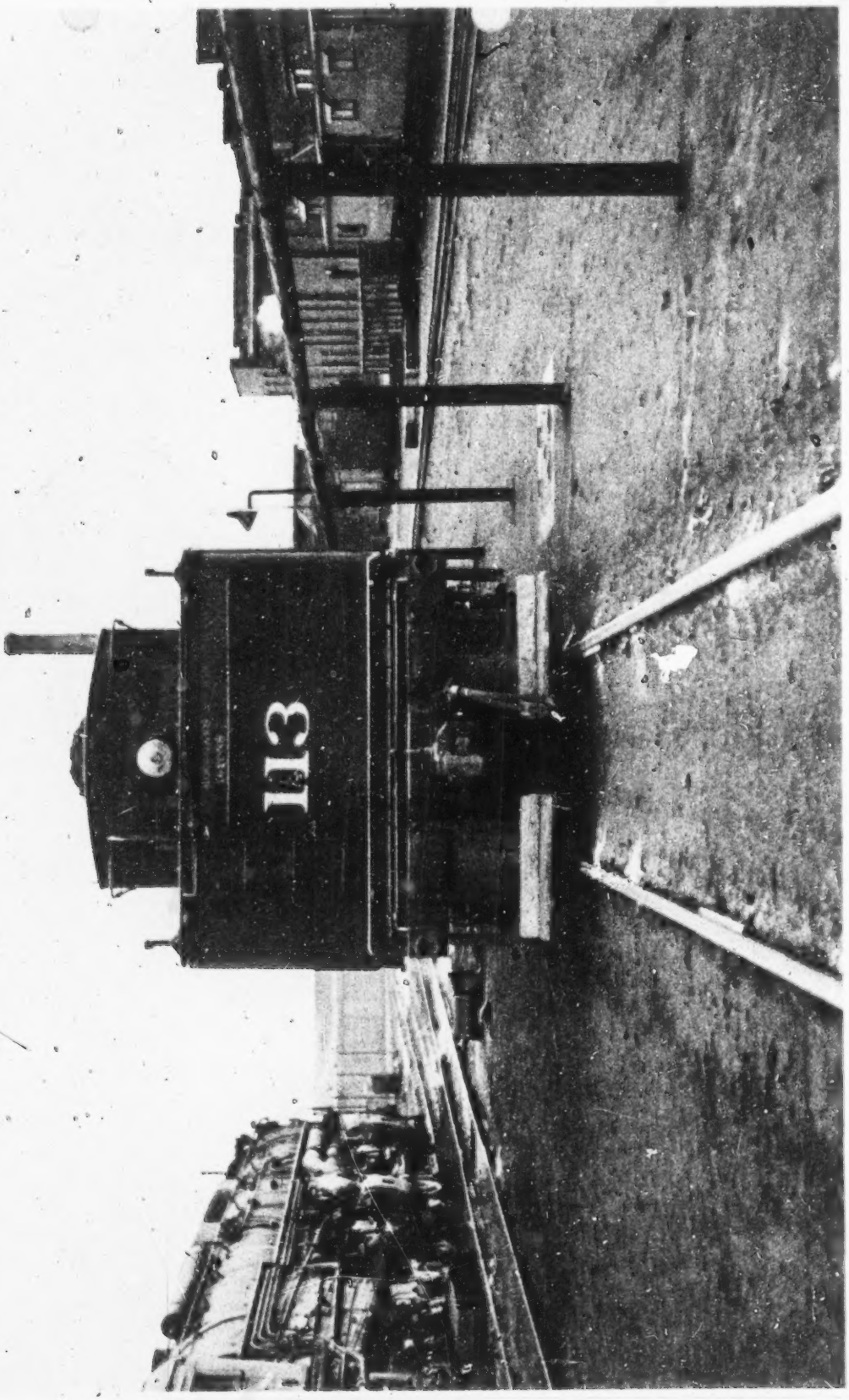
STIPULATION AS TO RECORD—Filed March 24, 1950

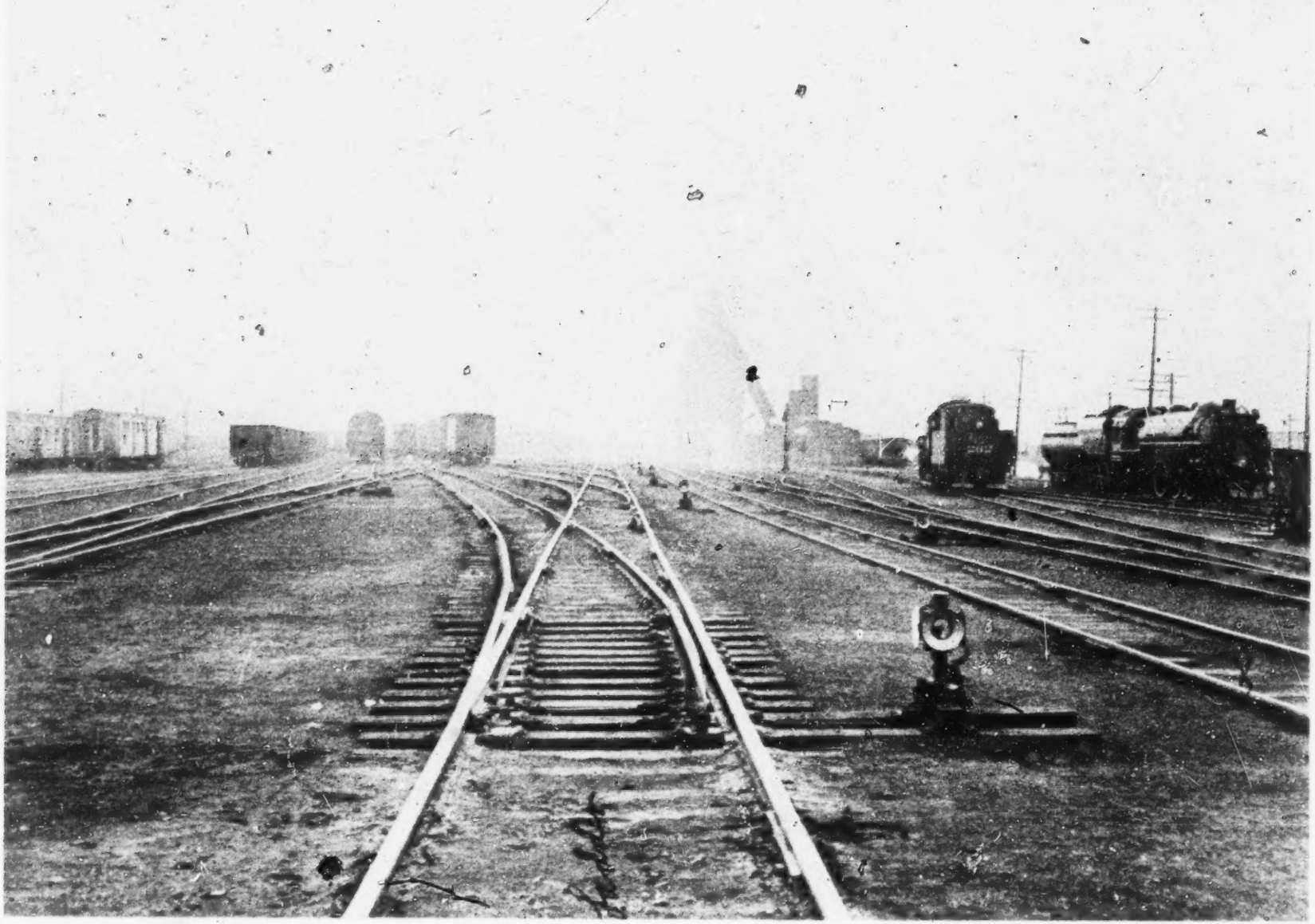
It is hereby stipulated between counsel for the respective parties that the record on appeal shall show that the deposition of the witness S. E. Wiles, which was filed on January 19, 1950, was taken by the plaintiff on September 2, 1949.

Walter Leake, Meade T. Spicer, Jr., Attorneys for the Defendant.

Geo. E. Allen, Attorney for the Plaintiff.

PLAINTIFF'S EXHIBIT NO. 1





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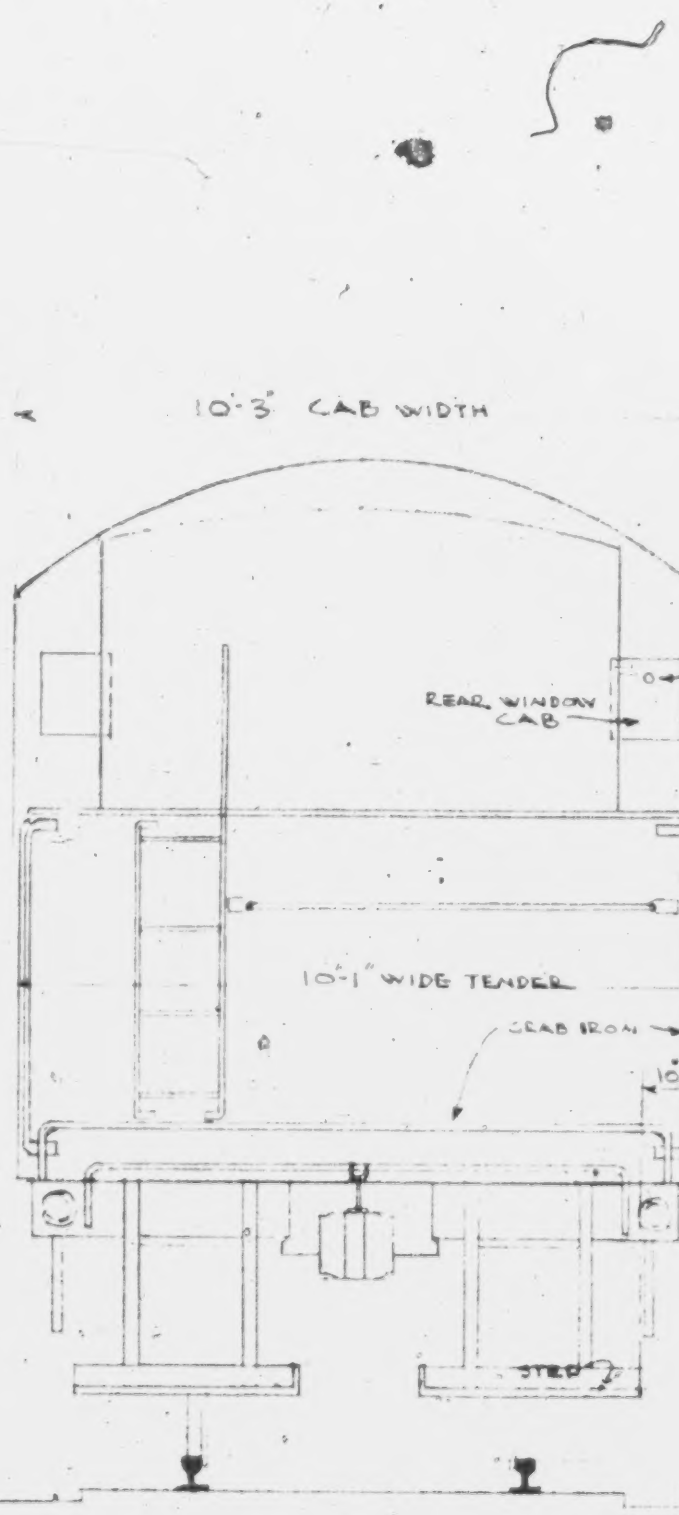
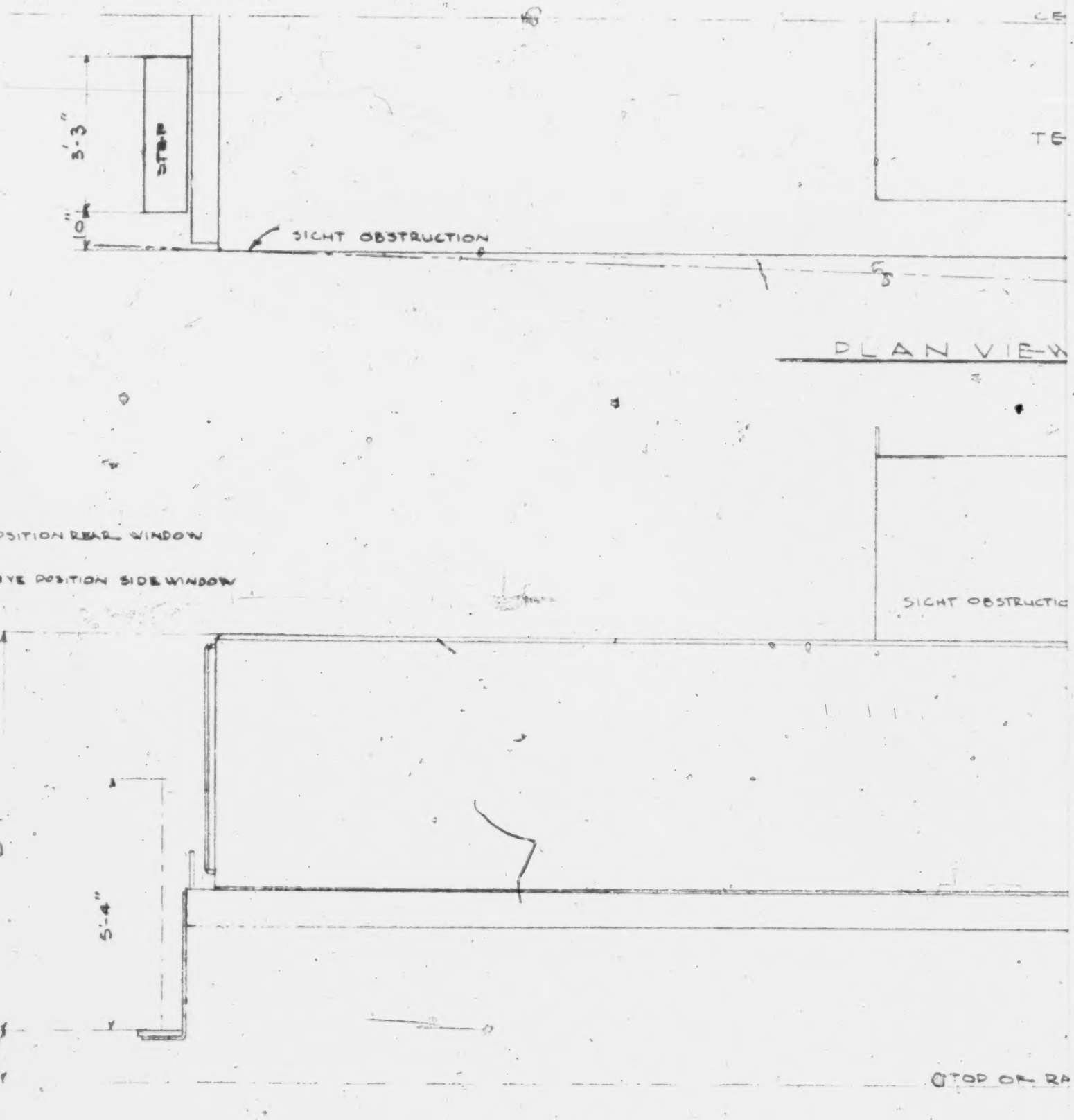



REAR ELEVATION




SIDE E

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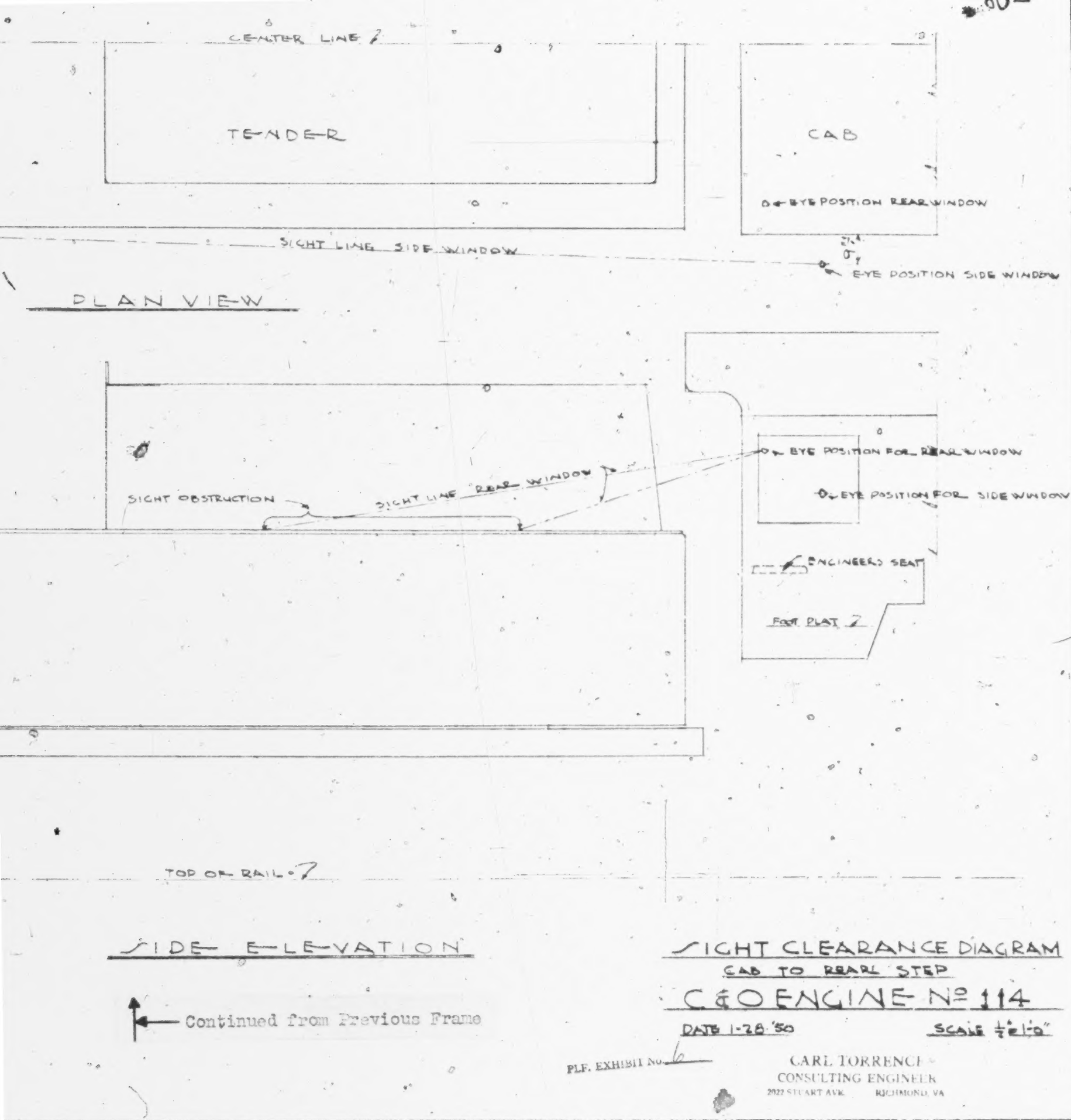



# SIGHT CLEARANCE DIAGRAM

## CAB TO REARL STEP

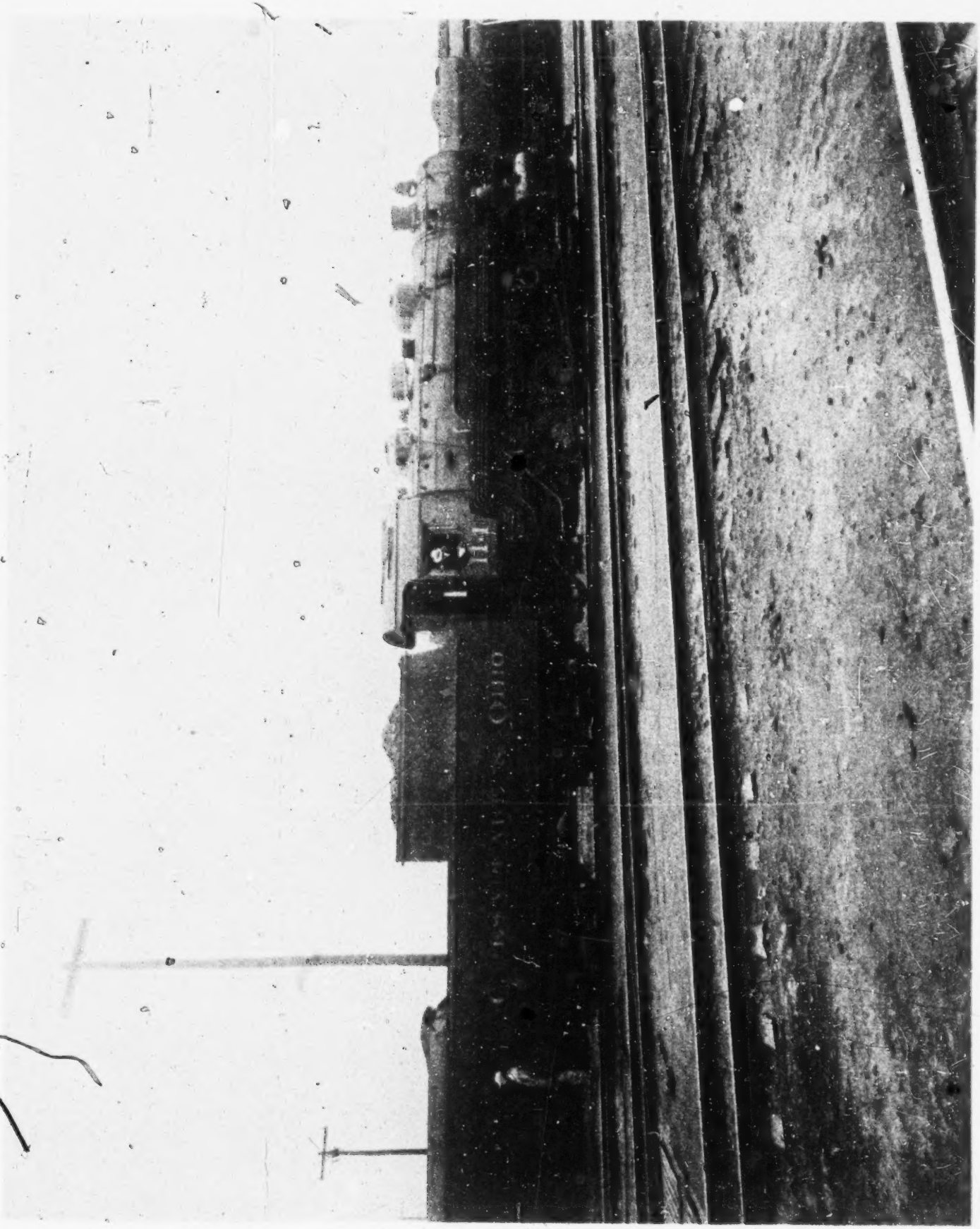
## C&O ENGINE No 114

DATE 1-28-'50 SCALE ½"=1'-0"

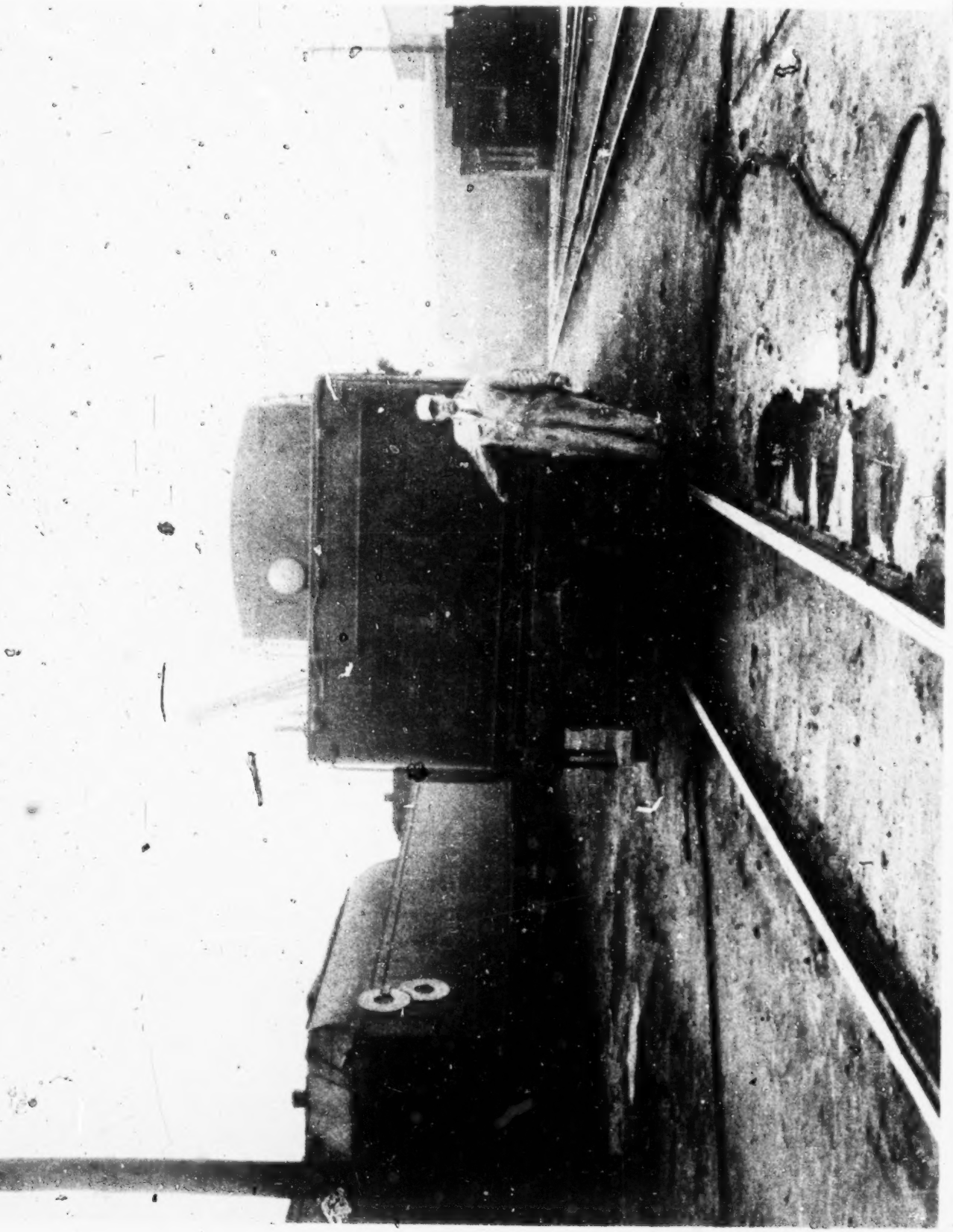
PLF. EXHIBIT No. 6

CARL TORRENCE
CONSULTING ENGINEER
2022 STUART AVE. RICHMOND, VA

DEFENDANT'S EXHIBIT "A"



DEFENDANT'S EXHIBIT "B"



[fol. 146] IN UNITED STATES DISTRICT COURT

RELEVANT DOCKET ENTRIES

| | |
|---|---|
| July 18, 1949 | Complaint filed 7/18/49. |
| July 29, 1949 | Motion and Notice of Motion to strike and more definite statement be supplied filed 7/28/49. |
| Aug. 8, 1949 | Answer of defendant filed 8/8/49. |
| Aug. 16, 1949 | Notice to take deposition of Edward Wiles filed by plf's. Atty. 8/16/49. |
| Oct. 31, 1949 | Order Requiring more definite statement and/or that certain wording shall be stricken from the complaint, ent. and filed 10/31/49. |
| Jan. 19, 1950 | Deposition of Edw. Wilds on behalf of plaintiff, filed 1/19/50. |
| Jan. 25, 1950 | Plaintiff's Praecipe for Three Subpoenas filed 1/25/50—Issued 1/25/50. |
| Jan. 26, 1950 | Marshal's return on subpoenas for Dr. Lefon, Enroughty, Gibson & Holland, "executed", filed 1/26/50. |
| Jan. 30, 1950 | *Trial Proceedings:* Appearance of parties and jury. Issue joined. Jury sworn and examined on Voir Dire. Jury duly impaneled and sworn to try issue. Evidence on behalf of plaintiff and plaintiff rested. Defendant moved for Dismissal under Rule 41b and for Directed verdict under Rule 50. Motions argued and decision reserved until after verdict. Evidence on behalf of Defendant and defendant rested. Evidence concluded. Defendant's motion to Dismiss and for Directed verdict renewed and decision reserved until after verdict. Adjournment. |
| Jan. 31, 1950 | *Trial Proceedings:* Appearance of parties and jury. Argument. Charge. Jury retired and returned into Court and rendered its written verdict in favor of plaintiff in amount of $34,000.00. Jury discharged. Defendant renewed motions heretofore made and also moved to set aside verdict and enter judgment in ac- |

Jan. 31, 1950 cordance with previous motions and for new trial. Motions taken under advisement.

Feb. 2, 1950 Defendant's written motion that action be dismissed; that jury verdict be set aside and that judgment be entered in accordance with motion for directed verdict and for new trial, filed 2/2/50.

Feb. 24, 1950 Opinion sustaining Defendant's motion for Directed verdict, filed 2/20/50.

[fol. 147] Feb. 27, 1950 Order setting aside jury verdict, entering judgment for defendant, dismissing case on merits and allowing costs to defendant, Ent. & filed 2/27/50. (Notice to Counsel (Rule 77d) mailed 2/28/50.)

Mch. 15, 1950 Plaintiff's Notice of Appeal filed 3/14/50.

Mch. 15, 1950 Appeal Bond Executed in sum of $250.00, filed 3/14/50.

Mch. 15, 1950 Reporter's Transcript, filed 3/14/50.

Mch. 21, 1950 Appellant's designation of Record on Appeal, filed 3/21/50.

Mch. 24, 1950 Stipulation to include in appeal record praecipe filed behalf plaintiff 1/24/50 for attendance of Enroughty, et al., filed 3/24/50.

Mch. 24, 1950 Stipulation that appeal record shall show deposition of Wiles ~~was taken on~~ Sept. 2, 1949, filed 3/24/50.

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[fols. 148-149] CLERK'S MEMORANDUM

Appeal Bond

(Filed March 14th, 1950)

*Obligors:*

Viola Hall Moore, Admr. of the est. of Louis Lee Moore, deceased, as Principal, and The Travelers Indemnity Company, as Surety.

*Amount of Bond:* $250.00.

*Date of Bond:* March 14th, 1950.

Conditioned to pay all costs.

[fol. 32] PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6092

VIOLA HALL MOORE, Administrator of the Estate of LOUIS LEE MOORE, JR., deceased, Appellant,

*versus*

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

March 29, 1950, the record on appeal is filed and the cause docketed.

March 30, 1950, the appearance of Walter Leake and Meade T. Spicer, Jr., is entered for the appellee.

April 3, 1950, the appearance of Geo. E. Allen and Geo. E. Allen, Jr., is entered for the appellant.

April 5, 1950, statement under section 3 of rule 10 is filed.

April 17, 1950, appendix to brief of appellant is filed.

May 22, 1950, brief of appellant is filed.

June 5, 1950, appendix to brief of appellee is filed.

June 7, 1950, the appearance of Strother Hynes is entered for the appellee.

June 7, 1950, brief of appellee is filed.

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[fol. 33] ARGUMENT OF CAUSE.

June 20, 1950, (June term, 1950) cause came on to be heard before Parker and Dobie, Circuit Judges, and Moore, District Judge, and was argued by counsel and submitted.

[fol. 34] OPINION—Filed August 10, 1950

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6092

VIOLA HALL MOORE, Administrator of the Estate of LOUIS LEE MOORE, JR., deceased, Appellant,

*versus*

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

(Argued June 20, 1950. Decided August 10, 1950.)

Before Parker and Dobie, Circuit Judges, and Moore, District Judge

George E. Allen (Allen, Allen & Allen on brief) for Appellant, and Meade T. Spicer, Jr., and Walter Leake (Strother Hynes on brief) for Appellee.

[fol. 35] MOORE, District Judge:

Appellant brought this action under the Federal Employers' Liability Act, in the District Court for the Eastern District of Virginia, alleging that the death of her decedent, Louis A. Moore, Jr., was caused by negligence of appellee's agents and seeking to recover damages therefor. At the close of the evidence appellee moved the Court to direct a verdict in its favor. The Court reserved decision on the motion and submitted the case to the jury, which returned a verdict for appellant in the amount of $34,000.00. Upon motion then made by appellee the Court set aside the verdict and entered judgment for appellee. The case is here on appeal from the District Court's action.

Moore fell from the footboard of an engine tender while engaged in the performance of his duties as a brakeman for appellee in shifting operations on the Fulton Yards of appellee at Richmond, Virginia. The only eye witness to the accident was appellee's engineer, who was called as a wit-

ness for appellant. He testified that he was backing the engine and tender at the rate of about five miles per hour, pulling thirty-three cars. It was mid-afternoon and the weather was fair. Moore was standing on a footboard which was attached to the rear of the tender (being the front of the train while backing) at a height of about one foot above the top of the rail. He was facing forward, in the direction in which the train was moving. The outside end of the footboard on which Moore was standing was ten inches from the outside edge of the tender, and the distance from the footboard to the top of the tender was eight feet, seven inches. The engineer further testified that prior to the accident he [fol. 36] could see part of Moore's left shoulder and arm while the latter was standing at the end of the footboard with his back to the engineer. In answer to a question whether Moore was "standing up straight", he said that he was; and on further questioning said that "he was standing up like that and he started to slump"; that it seemed as if Moore's knees gave way and he pitched from the footboard in a kind of somersault, striking the ground on the back part of his shoulder. The engineer said that he then made an emergency application of the brakes, which, because the air had been disconnected from the cars, did not bring the train to an immediate stop; the tender, engine, one car and about half the second car passing the spot where Moore had fallen beside the track. Moore was dead when the engineer reached him, his body lying outside the track and at an angle to it. Later examination showed that his neck was broken, his lower left arm severed, several of his ribs fractured, and his lungs punctured.

No other affirmative evidence bearing on the facts immediately surrounding the accident was adduced.

Having elicited the foregoing testimony from the engineer, appellant's counsel attempted to show, both by questions to the engineer and by an expert witness, that, because of the height of the tender above the footboard and the distance from the end of the footboard to the edge of the tender, the engineer's view was obstructed and it would have been impossible for him to see Moore while the latter was "standing up straight" on the footboard. However it was shown by a photograph introduced in evidence that the left shoulder and arm of a man standing on the footboard in a position only slightly varying from the perpendicular and

supporting himself by the hand rail would have been clearly visible to the engineer.

[fol. 37] Appellee, with corroboration from appellant, who was examined as a witness in her own behalf, proved that Moore had suffered a coronary occlusion thirteen months before his death, which, in the opinion of the attending physician at the time of treatment, was thought likely to recur. The physician who examined the body at the undertaker's establishment certified that death was due to the injuries sustained in the fall. No autopsy was made to determine whether there were signs of a recurrence of the heart condition.

Appellant's argument is as follows: She has shown (she says) that the engineer made an emergency stop, that Moore fell from the footboard, sustaining injuries from which he died, and that it was impossible for the engineer to see Moore while the latter was "standing up straight" on the footboard of the tender, as the engineer testified he was standing. Therefore, her argument continues, since the engineer testified falsely that he saw Moore start to fall, the jury might reasonably infer that the engineer, for some reason unconnected with Moore's fall from the footboard, made a sudden stop without warning Moore, *causing* the latter to fall from the footboard to his death, and that the engineer, as appellee's agent, was guilty of actionable negligence.

We are not impressed with this argument. We hold that the District Court correctly sustained appellee's motion for a directed verdict. We find in the record no evidence sufficient to support an inference of any negligent act on the part of the engineer, or that his stopping the train caused Moore to fall. It is elementary that mere proof that an accident occurred affords no basis for an inference that it was caused by negligence. It was not enough for appellant simply to show that the engineer stopped the train suddenly. Hu-

[fol. 38] mane feelings required such action when the engineer saw, as he says he did, that Moore had fallen or was falling off the footboard. To warrant an inference of negligence, appellant must have proved that the emergency stop was begun *before* Moore fell. This she failed to do.

In none of the cases cited by appellant do we find support for her argument that the evidence in this case is sufficient to supply an inference of negligence. In *Tiller* v. *Atlantic*

*Coast Line R. Co.*, 318 U. S. 54, a railroad employee, while standing between two tracks on a dark night inspecting the seals on the cars of a train moving slowly by him, was struck by the rear car of a train backing up on the adjoining track. It was held that there was a question of negligence for the jury. In *Tennant* v. *Peoria and P. U. Ry. Co.*, 321 U. S. 29, an engine crew were engaged in coupling cars situated intermittently along a track. Having completed the coupling operations, the engine remained stationary for five or ten minutes during which time the switchman disappeared around the rear of the engine going toward a point where his duties required him to be. He was never again seen alive. The engineer backed the engine up without ringing the bell, as, according to some of the conflicting evidence, he was required to do by a rule of the railroad company. Parts of the switchman's body were later found strewn along the track. The Court held that the question of proximate cause was one for the jury. In *Lavender* v. *Kurn*, 327 U. S. 645, a switch tender was struck on a dark night in the back of the head and killed. There were no eye witnesses, but the plaintiff claimed that deceased was struck by the tip of a mail hook hanging down on the outside of the mail car of a backing train. Due to the relative heights, the deceased could have been so struck only if he was standing near the track on a mound of cinders where his duties per-
[fol. 39] mitted him to be. The Court held that the question of negligence and proximate cause were properly submitted to the jury.

It will be noted that in each of these cases there was affirmative proof by circumstantial evidence from which the jury might reasonably infer negligence, and that such negligence was the proximate cause of the injury. No such evidence was offered in the instant case.

The fact that the witness whom appellant was compelled to call to prove her case was an employee of appellee did not relieve her from the burden of producing affirmative evidence from which an inference of negligence could be drawn. Appellant cites *Zumwalt* v. *Gardner*, 8th Cir., 160 F. (2d) 298, in which the plaintiff, a switchman, alleged that while he was attempting to get on the footboard of a Diesel engine he was suddenly thrown to the ground by a violent jerk caused by the negligence of the engineer in applying the brakes in emergency. The plaintiff called the engineer

as a witness and he denied having made the emergency stop. The Court held that the plaintiff was not necessarily bound by the testimony of the engineer who was a hostile witness. That case is clearly distinguishable from the one before us for decision. There the injured plaintiff himself testified that a sudden stop was made which threw him from the engine; whereas in the instant case there is no evidence of any kind to contradict the engineer in his statement that he stopped because he saw Moore fall. In *Eckenrode* v. *Penn. R. Co.*, 3rd Cir., 164 F. (2d) 996, aff'd 335 U. S. 329, where all the plaintiff's witnesses were employees of the defendant, the Court stated in a footnote that although the plaintiff was not bound by their testimony, yet, "belief that testimony is false will not support an affirmative finding [fol. 40] that the reverse of that testimony is true. Plaintiff has the burden of establishing his case by direct or circumstantial evidence; that burden is not met by pointing to the fact that all the available witnesses are hostile, and will not testify in a manner which would support the complaint."

We do not need to decide what might have been the result had appellant actually demonstrated that the engineer could not see Moore in the position the latter occupied on the footboard. We think the evidence, fairly interpreted, shows without contradiction that he *could* see him. Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above was "standing up straight", would normally answer "yes", as did the engineer when asked by counsel for appellant if Moore was "standing up straight". It is worthy of note that these were the words of counsel, and not of the witness. They were carefully framed, for no other apparent purpose than to provide an excuse to contradict the engineer's testimony. We are asked to believe that the engineer meant that Moore's body was absolutely perpendicular to the footboard; that it formed a ninety degree angle with it; that a plumb line dropped from the center of his head would touch the footboard midway between his feet. Such verbal gymnastics are not favored in law. A witness' words will not be given a strained and forced interpretation when they admit of a natural, ordinary, colloquial construction. "Standing up straight" means not slumped forward or sidewise; not crouched down or stooping over; not bent in any direction. Wigmore on Evidence (3rd Ed.), Sec. 780; 58 Am. Juris. 317.

No fact was brought to light which could support an inference that the engineer stopped the train for any reason other than that which he gave in his testimony. The train was moving at a very slow rate of speed; the engineer was [fol. 41] alert; the day was fair; the track was clear; the switch was open. Under this evidence the jury's verdict for appellant could have resulted only from speculation and conjecture. Such a verdict cannot be allowed to stand. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333; *Chicago, M. and St. P. Ry.* v. *Coogan*, 271 U. S. 472. The District Court was clearly right in setting the verdict aside and entering judgment for appellee.

Affirmed.

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[fol. 42] JUDGMENT—Filed and Entered August 10, 1950

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6092

VIOLA HALL MOORE, Administratrix of the Estate of LOUIS LEE MOORE, JR., deceased, Appellant,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Appellee

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Chief Judge, Fourth Circuit; Armistead M. Dobie, U. S. Circuit Judge; Ben Moore, U. S. District Judge.

August 18, 1950, petition of appellant for a stay of mandate is filed.

ORDER STAYING MANDATE—Filed August 22, 1950

(Style of Court and Title Omitted)

Upon the application of the appellant, by her counsel, and for good cause shown,

[fol. 43] It is ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

August 21, 1950.

John J. Parker, Chief Judge, Fourth Circuit.

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STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

VIOLA HALL MOORE, Administrator of the Estate of LOUIS LEE MOORE, deceased, Petitioner,

*versus*

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a domestic corporation, Respondent

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. Appendix to brief of appellant in the United States Court of Appeals for the Fourth Circuit.
2. Appendix to brief of appellee in the United States Court of Appeals for the Fourth Circuit.
3. The proceedings had before the United States Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioner will cause the Clerk of the United States Court of Appeals for [fol. 44] the Fourth Circuit to file with the Clerk of the Supreme Court the complete certified record on appeal in the Court of Appeals for the Fourth Circuit; and that, in the event that the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete record on appeal in that court as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

August 22, 1950.

Geo. E. Allen (Allen, Allen, Allen & Allen), Counsel for Petitioner; Meade T. Spicer, Jr., Walter Leake, Counsel for Respondent.

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[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 164] SUPREME COURT OF THE UNITED STATES

No. 318, October Term, 1950

ORDER ALLOWING CERTIORARI—Filed November 6, 1950

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 165] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD— Filed November 18, 1950

It is stipulated and agreed by and between counsel for the respective parties hereto that the Clerk of the United Stats Supreme Court may omit from the printed record the plaintiff's requests to the court to charge the jury and the defendant's requests to charge the jury.

Witness our hands this 16th day of November, 1950.

Geo. E. Allen, Attorney for Plaintiff.

Meade T. Spicer, Jr., Attorney for Defendant.

[fol. 166] [File endorsement omitted.]

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